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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

INTERNATIONAL PAPER COMPANY, *Petitioner,*

v.

FEDERAL POWER COMMISSION, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner International Paper Company respectfully prays that a writ of certiorari issue to review the judgments and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on March 2, 1971.

OPINION BELOW

The opinion of the Court of Appeals is not yet reported (App. A, *infra,* pp. 1a-19a). The Federal Power Commission's opinion and order are reported at 42 F.P.C. (Preliminary Print) 248; denial of rehearing and further disclosure at 42 F.P.C. 697; and re-

jection of petition for rehearing on such further disclosure not reported (App. B, *infra,* pp. 21a-36a). The opinion of the District Court of the United States for the Southern District of New York is not reported (App. C, *infra,* pp. 37a-45a).

JURISDICTION

The judgments of the Court of Appeals for the Second Circuit were entered on March 2, 1971 (App. A, *infra,* pp. 19a-20a), and this petition for certiorari is filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1) and Section 19(b) of the Natural Gas Act (52 Stat. 831 (1938); 15 U.S.C. § 717r(b)).

QUESTIONS PRESENTED

1. Is an industrial consumer's interstate transportation of natural gas for its own use "transportation in interstate commerce" within the limited meaning of that term as used in the jurisdictional provisions of the Natural Gas Act, so as to subject the consumer to the utility-type regulation provided by that Act?

2. Assuming, *arguendo,* that the jurisdictional provisions of the Gas Act were originally ambiguous, did the Commission's course of disclaiming coverage over such consumers fix the meaning of the Act beyond the Commission's power now to reverse it?

3. The Commission seeks to justifiy reversal of its 29-year history of jurisdictional disclaimers on assumptions as to the grounds thereof that are without foundation in the orders themselves or the limited parts of the records of those cases that the Commission has made public. The question presented is whether the exception of certain "intra-agency memorandums" from

the disclosure requirements of the Freedom of Information Act (5 U.S.C. § 552(b)(5)), justifies the Commission's refusal to disclose the rest of the records in those cases for such light as they may throw on the validity of the Commission's assumptions?[1]

4. Where, promptly upon the issuance of a Commission decision, a party objects that Commission employees engaged in the investigation or prosecution of the case against it had communicated to the Commission *ex parte* concerning the decision of the case, and had participated or advised therein, but the objections had been overruled, with no statement of reason therefor, may a reviewing court properly sustain the Commission on the ground that the party waived its objections by not advancing them before the decision was announced?

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved (App. D, *infra*, pp. 47a-49a) are:

> Sections 1(a), 1(b), 7(c) in part, and 7(e) of the Natural Gas Act, June 21, 1938, c. 556, 52 Stat. 821-833, as amended, 15 U.S.C. §§ 717(a) and (b), 717f(c) and 717f(e).
>
> Parts of sections 552(a), 552(b) and 554(d) of the Aministrative Procedure Act, Pub. L. 89-554, Sept. 6, 1966, 80 Stat. 383, as amended by Pub. L. 90-23, § 1, June 5, 1967, 81 Stat. 54; 5 U.S.C. § 552(a) and (b), and § 554(d).

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[1] IP seeks to reserve the right, if certiorari is granted, also to argue that the attempted distinctions of the disclaimers are factually unfounded or legally insufficient, and that the Commission's course of disclaimers was abundantly sufficient, in the circumstances, to fix the meaning of the Act as excluding IP's transportation from its coverage.

STATEMENT OF THE CASE

In at least six rulings scattered over a period of twenty-nine years following the enactment of the Natural Gas Act in 1938, the Federal Power Commission had consistently held that it had no regulatory jurisdiction over an industrial consumer's interstate transportation of its own natural gas for its own use.[2] Nevertheless, on September 5, 1967, the Commission ordered International Paper Company (IP) to show cause why it should not be required to obtain a certificate of public convenience and necessity to continue its transportation of gas it purchases in Louisiana from the producer at the tail-gate of a processing plant in the field, through its 6⅝ inch pipeline, 17.83 miles to its pulp mill near Natchez, in Mississippi (see App. A, *infra*, p. 3a).

The early Commission disclaimers contained no explanation of the reasoning on which they rested. While the public files of the Commission disclosed the representations and contentions made by the applicants, they did not contain the Staff's responses thereto, so that it was impossible to ascertain what issues had been framed and presented to the Commission for decision. As a consequence it was impossible to be sure that none of the disclaimers was based on some ground not

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[2] *Anchor Hocking Glass Corp.*, 2 F.P.C. 930 (1941); *The Consumers Company* (unreported letter of July 13, 1948; App. E, *infra*, p. 50a); *Jersey Central P. & L. Co.*, 9 F.P.C. 717 (1950); *Montana Power Co.*, 10 F.P.C. 950 (1951); *Reynolds Metals Co.* (unreported letter of March 27, 1959; R., J.App., p. 148); and *Transcontinental Gas P.L. Corp.*, 33 F.P.C. 242, 227-8 (initial decision), *affirmed*, 33 F.P.C. 237 (February, 1965), *supplemented and rehearing denied*, 33 F.P.C. 818, 819 (April, 1965), *affirmed sub nom. Public Service Elec. & G. Co.* v. *FPC*, 371 F. 2d 1, 5 (3rd Cir. 1967), *certiorari denied*, 369 U.S. 849 (October 9, 1967).

presented in IP's case. IP, therefore, requested disclosure of such responses. Its request was denied.

A stipulation of facts was entered into between counsel for IP and counsel for the Staff of the Federal Power Commission after incorporation therein of a change satisfactory to the Commission's General Counsel to meet an objection he raised when the counsel for the Staff sought to obtain his approval of a tentatively agreed-upon draft. After the usual briefs, initial decision, exceptions, and brief opposing exceptions, the Commission issued its decision finding IP's transportation to be within the coverage of the Act and ordering IP to apply for a certificate for its continuance (App. B, *infra,* pp. 21a-34a). In doing so it sought to justify its refusal to conform to its preceding disclaimers on assumptions as to the grounds on which those disclaimers were issued that have no basis in those orders or the Commission's public files of those proceedings.

Despite the General Counsel's unusual participation in the submission of the case, there was no indication that the General Counsel, or any of the other ranking members of the Staff who in recent years have usually sat with the Commission in its meetings, had excused himself from the meetings at which the decision was reached, or had abstained from advising or participating in the decision. Moreover, a passage in the Commission's opinion excited the suspicion that the General Counsel, indeed, had actively participated or advised in that decision.

IP filed an application for rehearing within the 30 days allowed by the Act, including therein its objections that members of the Staff who had engaged in the investigation or prosecution of the case, and particularly the General Counsel, had also participated or

advised in the decision. IP also requested therein that unless the Commission conceded the factual basis of such objections, it disclose documents bearing on the Staff's role in the proceeding and hold an ancillary hearing to permit IP to elicit the facts. The Commission routinely denied rehearing and denied without explanation the requests for disclosure and ancillary hearing (App. B, *infra,* pp. 34a-35a). IP's timely application for rehearing on these requests was subsequently rejected (App. B, *infra,* p. 36a).

IP filed for review of the Commission's orders in the Second Circuit under § 19(b) of the Gas Act (15 U.S.C. § 717r(b)) and brought a district court action as provided in the Freedom of Information Section of the Administrative Procedure Act (App. D, *infra,* pp. 48a-49a), in order to forestall any claim that failure to do so barred court of appeals review of the disclosure denials under § 19(b).

When the district court dismissed the action there, IP appealed its judgment to the Second Circuit where the appeal was consolidated with the proceeding to review the FPC orders. The Second Circuit affirmed the FPC orders and the judgment of the district court (App. A, *infra,* p. 18a).

REASONS FOR GRANTING THE WRIT

1. The Decision Below Oversteps a Critical Limitation on the Jurisdiction of the Federal Power Commission

Peculiar importance of the limitations imposed by Congress on the jurisdiction of the Federal Power Commission derives from the constitutional setting of the Natural Gas Act. The historical switch to natural gas by public utilities engaged in the local distribution of manufactured gas gave rise to a physically integrated

natural gas utility industry, from producing wellhead to the consumer's premises, that was at once highly localized in its retail service and intimately dependent upon an interstate system for its gas supply. The efforts of the states to regulate this new industry's end rates and services faced defeat when repeated decisions by this Court held that the transportation and sale of the gas in interstate commerce for local distribution was beyond the regulatory powers of the states under the commerce clause—the "*Attleboro* gap."[3]

This forced the states, acting through the National Association of Railroad and Utility Commissions (NARUC), to ask Congress to plug that gap. But they insisted that the jurisdictional basis for the new federal regulation should be scrupulously limited to the transportation and sales *in* interstate commerce that had been held beyond the states' constitutional powers.[4]

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[3] *Public Util. Comm'n.* v. *Attleboro Steam Elec. Co.*, 273 U.S. 83 (1927); *Missouri* v. *Kansas Gas Co.*, 265 U.S. 298, 308 (1924); see *East Ohio Gas Co.* v. *Tax Comm'n.*, 283 U.S. 465 (1931); *cf. Public Utilities Commission* v. *Landon*, 249 U.S. 236 (1919); *Pennsylvania Gas Co.* v. *Public Serv. Comm.*, 252 U.S. 23, 28 (1920).

[4] Hearings on H.R. 5423 before the House Committee on Interstate and foreign Commerce, 74th Cong., 1st Sess (1935), pp. 1637-9, 1621-1624, see generally 1604-1696; Hearings on S. 1725 before the Senate Committee on Interstate Commerce, 74th Cong., 1st Sess. (1935), pp. 756-757, 765-766, see generally 746-793; Hearings on H.R. 11662 before Subcommittee of House Committee on Interstate and Foreign Commerce, 74th Cong., 2d Sess. (1936), pp. 80-81, 86-88, see generally 79-98; Hearings on H.R. 4008 before the House Committee on Interstate and Foreign Commerce, 75th Cong., 1st Sess. (1937), pp. 20-24; see Benton, *Jurisdiction of the Federal Power Commission and of State Agencies in the Regulation of the Electric Power and Natural Gas Industries*, 14 Geo. Wash. L. Rev. 53-56 (1945). *Cf. FTC* v. *Bunte Bros.*, 312 U.S. 349, 355 (1941). On the interrelation of the legislative history of the Federal Power Act and the Natural Gas Act see *FPC* v. *Southern California Edison Co.*, 376 U.S. 205, 211 (1964).

They insisted that there should be no repetition for the gas and electric industries of what had happened to state regulation of railroads, under the *Shreveport* decision,[5] which had upheld ICC's exercise of jurisdiction to regulate intrastate transportation that *affects* interstate commerce, as well as transportation *in* interstate commerce. What the NARUC called for amounted to "a new pattern of federal and state relationship. . . ."[6]

The NARUC request, with its condition, was met. As the cases have since made abundantly clear,[7] Congress, by using the term "interstate commerce," which had been used in the "*Attleboro* gap" cases, made the "*Attleboro* gap" the statutory measure of the Federal Power Commission's jurisdiction over "transportation in interstate commerce" and "sales in interstate commerce for resale."[8]

The effectuation of this "new pattern" of state-federal relationship in the regulation of utilities that transcend the constitutional divisions of governmental

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[5] *Houston, E. & W. T. R. Co.* v. *Bunte Bros.*, 234 U.S. 342, 355-360 (1914).

[6] DeVane, *Highlights of Legislative History of the Federal Power Act of 1935 and the Natural Gas Act of 1938*, 14 Geo. Wash. L. Rev. 30, 35 (1945).

[7] *FPC* v. *Southern California Edison Co.*, 376 U.S. 205, 211-215 (1964); *Phillips Petro. Co.* v. *Wisconsin*, 347 U.S. 672, 682-683 (1954); *United States* v. *Pub. Util. Comm'n.*, 345 U.S. 295, 311 (1953); *Panhandle East. P.L. Co.* v. *Michigan P.S.C.*, 341 U.S. 329, 334 (1951); *FPC* v. *East Ohio Gas Co.*, 338 U.S. 464, 471-472 (1950); *FPC* v. *Panhandle East. P.L. Co.*, 337 U.S. 498, 502 (1949); *Panhandle East. P.L. Co.* v. *P.S.C. of Indiana*, 332 U.S. 507, 514-518 (1947).

[8] See particularly *FPC* v. *East Ohio Gas*, *supra*, n. 7.

powers has required, and continues to require, surveillance by this Court.

The decision below oversteps that statutory limit. It holds that a consumer's transportation of its own gas across a state boundary solely for its own use is "transportation in interstate commerce" (App. A, *infra,* p. 10a), although to do so requires approval of the Commission's reading the *Shreveport* doctrine into the Gas Act. The Commission, conceding that interstate transportation in itself is insufficient (App. B, *infra,* pp. 26a-27a, ¶¶ 17, 18) was forced to resort to the *Shreveport* doctrine. It equated the reach of the Gas Act to that of the commerce clause both by the cases it cites (App. B, *infra,* pp. 26a-27a, ¶¶ 18, 19) and by the basis it adopted for its decision:

> . . . [T]he transportation involved [here] is only a part, albeit an essential part, of a comprehensive commercial pattern involving (a) purchase of gas, (b) to be transported interstate, and (c) for use in a major commercial enterprise. . . .[9]

The Commission attempted to escape the limiting effect of the "*Attleboro* gap" as a measure of its jurisdiction by saying (App. B, *infra,* p. 32a, ¶ 37), "[t]he gap in regulatory experience that existed a generation ago has been superseded . . . ." The court below agrees, saying more bluntly (App. A, *infra,* pp. 12a-13a): "The limits of the Commission's jurisdiction . . . [have] not remained in the same *mold* throughout the years." (Emphasis supplied.)

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[9] In the court below Commission counsel explained (Br. p. 19) that IP's transportation links "production and sale of gas in Louisiana . . . with the manufacture and interstate sale and distribution of paper and paper products."

Both the Commission and the court below sought to support this claim that the Commission can enlarge its congressionally limited jurisdiction by patent misreadings of this Court's opinions in *FPC* v. *East Ohio Gas, supra,* p. 8, n. 7, and *FPC* v. *Transcontinental Gas Pipeline Co.,* 365 U.S. 1 (1961).[10] East Ohio's part of the interstate transportation was not "transportation for consumption," as the court below referred to it (App. A, *infra,* p. 8a), but transportation for sale, and was, therefore, "in commerce." All that was there decided was that to be "in interstate commerce" transportation does not have to be for sale *for resale.* The court below tries to brush this off with the declaration that to distinguish between transportation by a consumer for his own use and transportation for local distribution and sale to the public is "hair splitting" and "immaterial." This flouts the central purpose of the Gas Act.

And in *Transcontinental* there was no controversy over the Commission's jurisdiction, hence no decision whether such jurisdiction is measured by the *"Attleboro* gap" or whether that gap had been "superseded" as the measure of the Commission's jurisdiction. The question was solely one of the range of the considerations that might properly be taken into account as entering into the standard of public convenience and necessity guiding the exercise of the Commission's uncontroverted certificating jurisdiction over interstate transportation for hire.

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[10] Apart from the misconceived attempt of the court below to find in *FPC* v. *East Ohio Gas, supra,* a basis for saying that IP's transportation falls within the *"Attleboro* gap," no one has ever contended that it does, *i.e.,* that the states of Louisiana and Mississippi are limited by the commerce clause from regulating IP's transportation within their respective boundaries.

The affirmance by the court below of the Commission's assertions that the jurisdictional limit of the "*Attleboro* gap" has been superseded and its affirmance of the Commission's enlargement of its jurisdiction because of what the Commission regards as an "attractive gap" for its own occupation, jeopardizes the maintenance of the "new pattern of federal and state relationship" that this Court should preserve against the admitted breaking of the jurisdictional "mold" set by Congress.[10a]

2. The Decision Below Raises the Question of an Administrative Agency's Power To Reverse a Course of Interpretation Which Had Been Fully Sufficient To Remove a Statutory Ambiguity

IP contended before the Commission and in the court below[11] that if there were originally any ambiguity as to the sufficiency of the Act's use of the term "transportation in interstate commerce" to exclude consumers' own-use transportation from its coverage, such ambiguity had been removed by the Commission's long undeviating course of disclaiming jurisdiction culminating in court of appeals approval (*supra,* p. 4, n. 2). The court below misstated this contention as an argument that these prior disclaimers were controlling precedents, and rejected that proposition.[12]

[10a] The attempt of the court below to read Mr. Justice White's language for the Court in *United Gas Pipe Line Co.* v. *FPC,* 385 U.S. 83, 89 (1966), as stating that the Act covers all interstate transportation of natural gas ignores his careful specification: "... whether the transportation is for hire or for sale and whether the sale is for consumption or resale."

[11] For the statement of IP's contention see the extract from its initial brief in the court below (App. E, *infra,* p. 51a).

[12] App. A, *infra,* p. 11a.

In so doing it held, in effect, that although an agency's course of administrative interpretation of a statute may have fixed the meaning against the possibility of reversal at the behest of a person subject to the statute (as so interpreted),[13] the *agency* remains free to reverse that interpretation, without action by Congress. IP submits that, on principle, such a removal of an ambiguity is binding on the agency as well as the public.

3. The Decision Below on the Commission's Jurisdiction Conflicts With a Decision of the United States Court of Appeals for the Third Circuit

The decision below on the jurisdictional question is in conflict with the decision in *Public Service Elec. & G. Co.* v. *FPC*, 371 F.2d 1, 5 (1966), *certiorari denied*, 389 U.S. 849 (1967). There the Commission had granted a certificate to Transcontinental Gas Pipe Line Corporation to transport for Texaco, Inc., gas produced by Texaco in the Gulf Coast area of Texas and Louisiana adjacent to Transco's line to a point on Transco's line some four and a half miles from Texaco's oil refinery at West Deptford, New Jersey, where it would deliver the gas to Texaco which would transport it the rest of the way to its refinery. In issuing the certificate to Transco the Commission ruled that Texaco's transportation did not require a certificate (33 F.P.C. at p. 247).

The court below says that Transco's part of the interstate transmission "admittedly was subject to Commission regulation", that Texaco's part was "solely within the state of New Jersey," and that the Commission had determined that Texaco's pipeline was a part

[13] A number of cases were cited by IP before the court below (App. E, infra, p. 51a).

of its plant facility (App. A, *infra*, p. 13a). But none of those factors has any relevance to whether IP's transportation is, any more than Texaco's, transportation in interstate commerce within the meaning of the "*Attleboro* gap" cases. The first two were held insufficient in *FPC* v. *East Ohio Gas Co.*, *supra*, p. 8, n. 7, and the difference between Texaco's 4½ mile, 8 inch pipeline and IP's 17.83 mile, 6⅝ inch pipeline, both crossing private and public lands, is a matter of degree only. The two courts of appeals reach conflicting results because of conflicting decisions of the same principal subsidiary legal issues.

4. The Decision Below Raises an Important Question as to the Scope of the Disclosure Required by the New Freedom of Information Act

IP's inability to make the maximum use of the early Commission disclaimers, due to its lack of access to the full records of those cases (*supra*, pp. 4-5), was serious enough,[14] but the refusal of disclosure took on a new dimension, when the Commission's opinion and order relied on undisclosed sources in its attempts to distinguish or justify not conforming to that line of deci-

[14] The failure of the FPC to publish "opinions articulating the basis of decision" was severely criticized about the time of the first disclaimer (*Anchor Hocking*). Attorney General's Committee on Administrative Procedure, *Final Report* (1941), p. 182; S. Doc. No. 8, 77th Cong., 1st Sess., p. 182. The singular persistence of the criticized practice in these reported and unreported disclaimer cases for almost two more decades invites the question whether this constitutes a system of "secret law" in violation of the openness sought by the 1967 Freedom of Information Section of the Administrative Procedure Act (see *infra*, p. 15, n. 16) into which the Commission has fallen, perhaps unwittingly, in an anticipatory effort to protect its jurisdictional flanks—an effort that is understandable but cannot be countenanced.

sions.[15] IP thereupon renewed its request for disclosure and upon denial thereof by the Commission brought its district court action under the Freedom of Information Act (see App. A, *infra*, p. 5a).

Under § 552(a)(3) of the Freedom of Information Act "any person" is entitled to disclosure of any identifiable record not specifically excepted by § 552(b). The only exception claimed by the Commission or relied on by the court below is the fifth (§ 552(b)(5)): "inter-agency . . . memorandums . . . which would not be available by law to a party other than an agency in litigation with the agency."

The court below overruled *sub silentio* IP's contentions with respect to the scope of this exception that presented important questions going to the efficacy of this new statute. IP contended that Staff responses to the applications in the disclaimer cases would have been "available by law" to the respective applicants in those cases under the rule of *Morgan* v. *United States*, 304 U.S. 1, 18-19 (1938), and hence that they were

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[15] For example (1) there is nothing in the order of the public file of the *Anchor Hocking* disclaimer case that shows that that decision was based on one of the parts of § 7(c) that was changed by the amendment of that section the next year, so as to support the Commission's conclusion in this case that a "modified statutory standard" and the Commission's "accumulated experience" make the *Anchor Hocking* disclaimer "no longer appropriate to the needs of this period" (App. B, *infra*, p. 33a, ¶ 38); (2) there is nothing in the orders or public files in the *Jersey Central*, *Montana Power*, and *Reynolds Metals* cases that shows that the orders in those cases "merely follow the earlier precedent [*Anchor Hocking*] uncritically" (App. B, *infra*, p. 32a, ¶ 37)—particularly in the light of the fact that none of those three disclaimer orders even cites *Anchor Hocking*—and (3) there is nothing in the order or public file in the *Jersey Central* case, that shows that the disclaimer in that case rested on an absence of a preceding purchase of the gas, or on the location of the applicant's facilities wholly within a single state, as the Commission here asserted (App. B, *infra*, p. 32a, ¶ 36).

opened to disclosure to any person by the Freedom of Information Act (App. E, *infra,* pp. 54a-55a). IP also contended that the "intra-agency memorandums" exemption is limited to "premature disclosure", which certainly excludes these 11-29 year old records (App. E, *infra,* pp. 55a-57a). And IP contended that in submitting those responses the same Staff was performing the same functions that it performs publicly in the same kinds of cases if a hearing is held, and that publicity in the one situation does not, any more than in the other, prevent the full and frank communication that it was the purpose of the fifth exception to protect (App. E, *infra,* pp. 57a, et seq.).

To assure members of the public access equal to that of the Government to the sources of "administrative law" was one of the principal concerns of Congress and the President in the enactment and approval of the Freedom of Information Act,[16] as it must be of all who abominate the police state; and the decision below goes to the heart of that concern.

5. The Decision of the Court Below Raises the Important Question of a Reviewing Court's Power To Affirm an Administrative Agency's Order on a Ground It Did Not Assign

In its petition for Commission rehearing[17] and in the court below IP contended that *ex parte* communication to the Commission by members of the Staff who had

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[16] S. Rep. No. 813 to accompany S. 1160, 89th Cong., 1st Sess. (1965), pp. 2-3, 7; H.R. Rep. No. 1497 to accompany S. 1160, 89th Cong., 2nd Sess. (1966), pp. 1-8; *Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act* (1967), pp. II, III; Hearings on S. 1160, et al., before Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary, 89th Cong., 1st Sess. (1965), pp. 144, 145, 148, 187-188; Davis, *The Information Act: A Preliminary Analysis,* 34 U. Chi. L. Rev. 761, 797 (1967).

[17] R., J.App., pp. 112, 123.

engaged in the investigation or prosecution of the case had denied IP the fair hearing to which it was entitled.[18] IP also contended that such members had participated and advised in the decision of the case in violation of § 554(d) of the Administrative Procedure Act. These serious questions are by-passed in the decision below "on the grounds that [IP] has condoned and waived this point" (App. A, *infra*, p. 14a). But there is no record foundation for such a finding and there has been no finding or conclusion to that effect by the Commission. The attempted avoidance by the court below of the questions raised by IP is in conflict with the well established rule that an administrative agency's actions can be affirmed only on grounds that the agency has assigned for them. *Burlington Truck Lines, Inc.* v. *United States*, 371 U.S. 156, 168-169 (1962); *Sunray Mid-Continent Oil Co.* v. *FPC*, 353 U.S. 944 (1957); *SEC* v. *Chenery Corp.*, 332 U.S. 194, 196-201 (1947); *SEC* v. *Chenery Corp.*, 318 U.S. 80, 87-95 (1943). Surveillance by this Court is called for to maintain the jurisdictional demarcation between the functions of the courts and those of administrative agencies.

CONCLUSION

For the foregoing reasons a writ of certiorari should issue to review the judgments and opinion of the Second Circuit.

Respectfully submitted,

HOWARD E. WAHRENBROCK
605 - 1725 K Street, N.W.
Washington, D.C. 20006
Counsel for Petitioner

May 28, 1971

[18] App. E, *infra*, pp. 52a-55a. The opinion below does not mention this contention.

APPENDIX

APPENDIX A

Opinion and Judgments of the Court Below

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 258-9—September Term, 1970

(Argued December 7, 1970 Decided March 2, 1971)

Docket Nos. 34265, 34991

INTERNATIONAL PAPER COMPANY, *Plaintiff-Appellant,*

v.

FEDERAL POWER COMMISSION, *Defendant-Appellee.*

Before:

LUMBARD, *Chief Judge,* FEINBERG, *Circuit Judge;*
and CLARIE, *District Judge.**

Consolidated appeal from a decision of the Federal Power Commission, 42 FPC 248, subjecting Appellant to its jurisdiction and denying requests for disclosure of certain documents and from a judgment of the Southern District of New York, Wyatt, *J.*, sustaining the Commission's denial of disclosure under the Freedom of Information Act. *Affirmed.*

HOWARD E. WAHRENBROCK, Washington, D. C., *for. Plaintiff-Appellant.*

PETER H. SCHIFF, Solicitor, Washington, D. C. (Gordon Gooch, General Counsel, George Lewnes, Assistant General Counsel, Israel Convisser, Attorney, Robert C. McDiarmid, Assistant to the General Counsel, Washington, D. C., on the brief), *for Defendant-Appellee.*

* Of the District Court of Connecticut, sitting by designation.

CLARIE, *District Judge:*

This appeal from a decision of the Federal Power Commission (FPC) claims that the Commission unlawfully attempted to extend its jurisdiction beyond its statutory authority; and that in the performance of its duties, it not only had violated "the separation of functions" provisions of the Administrative Procedure Act, 5 U.S.C. § 554(d), but also the Freedom of Information Act, 5 U.S.C. § 552. For purposes of this appellate review, there has been consolidated in the appeal, a related court decision from the Southern District of New York, dismissing the International Paper Company's (International's) separate court action requesting the production of certain Commission records alleged to have been wrongfully withheld (5 U.S.C. § 552(a)(3)).

The case presents for judicial determination: (1) the novel issue of whether a company's "own-use" transportation of natural gas through company-owned pipelines across state lines is within the jurisdiction of the FPC; (2) whether staff memoranda underlying prior Commission orders, and relating to precedent cases, as well as the present proceeding, is required to be disclosed under the Freedom of Information Act; and (3) whether the Commission's order in this proceeding was unlawful, because certain legal staff members had violated 5 U.S.C. § 554(d), by participating in both the investigatorial and prosecutorial functions of the Commission against International and had in addition advised the Commission in reaching its ultimate decision. We affirm both the decision of the Commission and the District Court on all issues.

FACTS

The stipulation of facts discloses that International operated a paper manufacturing plant at Natchez, Mississippi, which required substantial quantities of natural gas in its manufacturing processes. Initially, it had purchased

this fuel under a standard utility service sales arrangement, from a pipeline company which was admittedly subject to the Commission's jurisdiction under the Natural Gas Act. However, in September, 1963, International executed a new agreement with Humble Oil and Refining Co. (Humble), a corporate affiliate of the Standard Oil Company of New Jersey, to purchase gas at the tailgate of Humble's processing plant in Lake St. John Field, Louisiana, which would be transported by International through a pipeline crossing the state line to the Natchez, Mississippi, plant for its own industrial consumption.

This 17.83 miles long pipeline was originally financed and built by Humble, at the latter's sole expense for a total cost of $450,573.10. In February 1964, it conveyed to International title to the pipeline pursuant to a product use agreement. As part of the consideration for this arrangement, International agreed to purchase quantities of gas from Humble through said pipeline at 23¢ per Mcf. The agreement contained a proviso that if the Natchez plant ceased to purchase gas from Humble's Louisiana refinery prior to the agreed termination date, International would be obligated to reimburse Humble for liquidated damages, to the extent of the unamortized remaining balance of the pipeline cost, as determined by an agreed formula. In 1967, International was purchasing about one-quarter of its supply from its old source (Humble Gas Transmission Co.) and three-quarters of its needs through its newly acquired pipeline.

The new contract between International and Humble first came to the attention of the Commission in mid-1965, when its secretary noticed that the 1963 contract of International with Humble Gas Transmission Co. also referred to the new source of supply. Thereupon, the FPC's Bureau of Natural Gas corresponded with International suggesting that the transaction was within the jurisdiction of the Commission and that it should either apply for a certificate of public convenience or seek a disclaimer of jurisdiction.

When these attempts to resolve the matter were resisted, the Commission issued an order in September 1967, directing International to show cause why its transportation of natural gas should not be subject to the Commission's jurisdiction under § 1(b) of the Natural Gas Act and why International should not be required to apply for and obtain a certificate of public convenience and necessity under § 7(c) and (e) of the Act to operate a transmission line across a state line.

International then requested the Commission's secretary to disclose to International all staff memoranda in three earlier disclaimer cases, which it claimed related to similar rulings affecting other companies. It represented that the Commission's holdings in those cases established legal precedents relevant to sustain its own situation. After a hearing before the Commission on October 9, 1967, the requested disclosure was denied; and thereafter on November 30, 1967, its petition for a rehearing was denied.

After a factual hearing on the merits, the hearing examiner found on December 13, 1968, that the Commission did have jurisdiction over the subject matter and his ruling was later affirmed by the FPC on July 29, 1969. It held that the transportation of natural gas by International was interstate in character and subject to Commission regulation under the authority granted by the Natural Gas Act.

On August 28, 1969, International petitioned for a rehearing, at which time it raised an ancillary issue to the jurisdiction question claiming that the Administrative Procedure Act (APA) provisions 5 U.S.C. § 554(d) had been violated by the Commission, because the staff attorney had acted in cooperation with the Assistant General Counsel and the General Counsel in the processing of the enforcement order. International complained that it had thus engaged in both the investigatorial and prosecutorial functions of the Agency and at the same time had participated in an advisory capacity, when the Commission reviewed the case and prepared its decision.

International appealed the Commission's decision on the jurisdiction issue to this Court on November 21, 1969. That same day, a separate court action was commenced in the Southern District of New York against the FPC, requesting an order to obtain all staff memoranda in the Commission's files relating to previously decided cases[1] which International claimed established a Commisison precedent, which must be followed here. It also asked for a similar staff memoranda relating to its own proceedings before the Commission. However, the latter's Secretary disclosed that this information was non-existent, therefore that request becomes moot. On May 15, 1970, the District Court granted the Commission's motion to dismiss International's action, and from this decision an appeal has been taken. On June 23, 1970, this Court granted a motion to consolidate both the appeal from the Commission's order and the District Court judgment for purposes of hearing and review.

Jurisdiction Issue

The jurisdiction issue simply stated is whether International's transportation of its own natural gas, under the conditions hereinbefore set forth, is subject to FPC's supervision and control, thus requiring a certificate authorizing such interstate transportation or in the alternative, an order disclaiming Commission jurisdiction. The relevant sections of the Natural Gas Act provide:

15 U.S.C. § 717(b):

"The provisions of this chapter shall apply to the transportation of natural gas in interstate commerce

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[1] These cases were:

Anchor Hocking Glass Corporation, Docket No. G-204, as reported at 2 F.P.C. 930.

Jersey Central Power & Light Company, Docket No. G-1324, as reported at 9 F.P.C. 717.

The Montana Power Co., Docket No. G-1627, as reported at 10 F.P.C. 950.

and the Reynolds Metals Company litigation.

> . . . and to natural-gas companies engaged in such transportation . . . but shall not apply to any other transportation . . . of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas."

15 U.S.C. § 717a(6):

> " 'Natural-gas company' means a person engaged in the transportation of natural gas in interstate commerce, or the sale in interstate commerce of such gas for resale."

15 U.S.C. § 717a(7):

> " 'Interstate Commerce' means commerce between any point in a State and any point outside thereof, or between points within the same State but through any place outside thereof, but only insofar as such commerce takes place within the United States."

The Supreme Court faced a similar issue in *Federal Power Commission* v. *East Ohio Gas Co.*, 338 U.S. 464 (1950), where the respondents were transporting natural gas solely for public consumption within the State of Ohio. The respondents there contended that the word "transportation" in § 717(b) *supra* must be "construed as applying only to companies engaged in the business of transporting gas in interstate commerce for hire or for sales to be followed by resales, whereas East Ohio does neither" (at 468). Justice Black rejected the argument finding that:

> "[T]he Act's language did not express any such limitation. . . . As we pointed out in *Panhandle Eastern Pipe Line Co.* v. *Public Service Comm'n*, 332 U.S. 507, 615, (717(b)) made the Natural Gas Act applicable to three separate things: '(1) the transportation of natural gas in interstate commerce; (2) its sale in interstate commerce for resale; and (3) natural gas companies engaged in such transportation or sale.' And throughout the Act 'transportation' and 'sale' are

viewed as separate subjects of regulation. They have independent and equally important places in the Act. Thus, to adopt respondents' construction would unduly restrict the Commission's power to carry out one of the major policies of the Act" (at 468).

In an accompanying footnote, he distinguished the cases cited by appellant, the *Pipe Line Cases,* 234 U.S. 548 (1964) (Uncle Sam Oil Company), which held in part that the Interstate Commerce Act did not encompass "transportation" when the company was "simply drawing oil from its own wells across a state line to its own refinery for its own use, and that is all. . . ." He comments: "This holding as to the meaning of transportation in the Interstate Commerce Act has slight force, if any, in determination of the word's meaning under this different and far more comprehensive Act" (469, n. 9).

Despite this clear explication of the meaning of transportation in interstate commerce under the Natural Gas Act, appellant contends that its operation, while admittedly between two states, does not fall under the terms of the Act, because the Congress has given the FPC jurisdiction only to the limits of the "Attleboro gap." This picturesque phrase developed from events occurring after the Supreme Court's decision in *Public Utilities Commission of Rhode Island* v. *Attleboro Steam & Electric Company,* 273 U.S. 83 (1927) which checked Rhode Island's attempt to set rates on an electric company receiving power from Rhode Island in Massachusetts as a direct burden on interstate commerce. Subsequently, the Natural Gas Act was passed in 1938 with the intent to provide Federal regulation in the area declared by *Attleboro* to be immune from State regulation. As was pointed out in *Panhandle Eastern Pipe Line Co.* v. *Public Service Commission of Indiana,* 332 U.S. 507, 517:

"The Act, though extending federal regulation, had no purpose or effect to cut down state power. On the con-

> trary, perhaps its primary purpose was to aid in making state regulation effective, by adding the weight of federal regulation to supplement and reinforce it in the gap created by the prior decisions."

See also, *Federal Power Commisison* v. *Southern California Edison Co.*, 376 U.S. 205 (1964) where the Court noted with reference to a similar statutory section of the Federal Power Act:

> ". . . Congress meant to draw a bright line easily ascertained, between state and federal jurisdiction, making unnecessary such case-by-case analysis" (at 215-216).

Merely because Congress in passing the Natural Gas Act did not totally preempt the field of State regulation, does not compel this Court to conclude that International's transportation of natural gas across state lines was not within FPC jurisdiction. Such an argument was made in *East Ohio Gas, supra,* based on the "gap" in which Congress had regulated, to contend that transportation across state lines for consumption was without the coverage of the Act. While Justice Black "adhere(d) to those statements" of the Court on the "Attleboro gap," he did not concede that this made the gas company's enterprise non-jurisdictional.

> "(Congress) therefore acted under the federal commerce power to regulate what these decisions had indicated that the states could not. We have already held that in so doing Congress subjected to federal regulation a company transporting interstate gas, and selling it for resale, wholly within one state . . . . The only respect in which East Ohio differs from the company is that it sells gas direct to consumers rather than for resale. This difference is immaterial. For as we have already pointed out, East Ohio comes directly within the express provision to regulate 'transportation of

natural gas in interstate commerce' just as the Illinois company came directly within the express provision concerning the sale for resale" (at 473).

Similarly, the appellant's activities fall directly under the terms of the Act as to transportation of gas in interstate commerce and are properly subject to FPC regulation. No case has been cited by the appellant that would indicate that this type of transportation was immune from federal regulation. Indeed if contract arrangements of this type were to be condoned and thus encouraged, it would so limit the Commission's authority as to defeat the purposes of the Act. References in both *Panhandle Eastern Pipe Line Co.* v. *Pub. Service Comm. of Indiana, supra,* and *Panhandle Eastern Pipe Line Co.* v. *Michigan Public Service Commission,* 341 U.S. 329 (1951) so indicate. In these latter cases a pipe line company sought to defer local state regulation of its direct sale to industrial consumers on the grounds that such sales were subject to the jurisdiction of the FPC. The courts rejected these contentions. While holding that the sales were subject to state regulation and not within the "Attleboro gap," nevertheless, it held that the actual transportation of the gas by the pipe line company across state lines to the point of the direct sale was still under FPC jurisdiction and in interstate commerce. In the Indiana case, for example, the contention was made that to allow the States these regulatory powers over the sales would lead to conflicts between each of the states and between the states and the FPC. The court replied:

"There is no evidence thus far of substantial conflict in either respect and we do not see that the probability of serious conflict is so strong as to outweigh the vital local interests to which we have referred requiring regulation by the states. Moreover, if such conflict should develop, the matter of interrupting service is one largely related, as appellees say, to transportation and thus within the jurisdiction of the Federal Power Com-

mission to control, in accommodation of any conflicting interests among various states" (at 523).

Therefore, the conclusion must be drawn that appellant's transportation of natural gas is "in interstate commerce" as used in the Natural Gas Act and not outside the "Attleboro gap." International's transportation differs from the *Panhandle* transportation in that International itself is the ultimate industrial purchaser, who is transporting its purchased gas across state lines. This hair-splitting over who is the transporter of the commodity is immaterial under the Gas Act. Analogously, the Court in *East Ohio* declared:

> "We find no language in the Act indicating that Congress meant to create an exception for every company transporting interstate gas in (this instance). Regardless of whether it might have been wiser and more farseeing statesmanship for Congress to have made such an exception, we should not do so through the interpretative process. There is nothing in the legislative history which authorizes us to interpret away the plain congressional mandate" (at 474).

Moreover in the structuring of this transaction, the parties have avoided the case of *F. P. C.* v. *Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1 (1961) which held that federal jurisdiction extended under the Natural Gas Act to determine whether direct sales of gas would lead to economic waste or pricing difficulties. These considerations were held proper areas for FPC deliberation, because the Court found that appellant's construction left an "attractive gap" in the regulations, which it was the intent of Congress to close. Mere formalisms urged by the appellant in the present case should not be able to alter this policy of Congress reaffirmed by the Court in the *Transcontinental* case.

International's reliance on the *United Gas Pipe Line Co.* v. *FPC* case, 385 U.S. 83 (1966) is misplaced. While Jus-

tice White does refer at page 89 to certain specific transportation activities such as for hire, or for sale, and whether the sale is for consumption or resale, he concludes that all of this constitutes transportation in interstate commerce under the Act; and his list is not exclusive. He equates transportation of natural gas under the Act with "the movement of gas in interstate commerce." The opinion does not indicate that just because the transportation across state lines is for one's own use, it should be outside of FPC jurisdiction. Rather he unequivocally states,

> "The Act give the Commission jurisdiction over interstate transportation of natural gas as a separate and distinct matter. . . ." (at 89).

One of the appellant's major arguments is that there were four disclaimers issued by the Commission in previous years that appear to cover transactions similar to that which is attempted here and that these prior disclaimers established precedents which should control. These disclaimers hereinbefore referred to include: *Anchor Hocking, Jersey Central, Montana Power,* and *Reynolds Metals.*

It is a well established law, however, that questionable decisions of adjudicatory bodies may be overruled in appropriate circumstances. As Justice Frankfurter stated in *Helvering* v. *Hallock,* 309 U.S. 106 (1940):

> "We recognize that *stare decisis* embodies an important social policy. It represents an element of continuity in law, and is rooted in the psychologic need to satisfy reasonable expectations. But *stare decisis* is a principle of policy and not a mechanical formula of adherence to the latest decision, however recent and questionable . . ." (at 119).
>
> "This Court, unlike the House of Lords, has from the beginning rejected a doctrine of disability at self-correction" (at 121).

In matters involving the FPC, it has also been recognized that the power to break the chain of precedents exists. In *Phillips Petroleum Co.* v. *Wisconsin,* 347 U.S. 672 (1954), the Court subjected independent producers of natural gas for FPC jurisdiction. In reviewing the prior decisions of the Commission, the Court noted that there were certain inconsistencies, but even if all prior decisions were in Phillips' favor these could be overruled, because "even consistent error is still error" (678, n. 5).

And similarly, in the *Permian Basin Area Rate Cases,* 390 U.S. 747 (1968), the Court in discussing a Power Commission action said:

> "Nor may its order properly be set aside merely because the Commission has on an earlier occasion reached another result; administrative authorities must be permitted, consistently with the obligations of due process, to adapt their rules and policies to the demands of changing circumstances" (at 784).

The disclaimers relied upon here were such that they could be validly overruled. None of the four cases were contested and disposition was essentially on a consent basis. Since both sides were in agreement, there was no judicial review. The earliest of the disclaimers, *Anchor Hocking,* was granted under the language of the Act as it read in 1938 and not in 1942,[2] after an amendment went into effect, described in *East Ohio, supra,* as "broadening the Commission's powers over the construction or extension of pipelines" (at 468).

The limits of the Commission's jurisdiction have been constantly under review and subject to interpretation since the passage of the Act and it has not remained in the same

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[2] The Natural Gas Act, subsection 7(c) was amended and subsections 7(d), (e), (f) and (g) were added February 7, 1942 by Public Law No. 444, 77th Congress, Chapter 49, 2d Session (H.R. 5249), 56 Stat. 83, 84; it is also 15 U.S.C. § 717f (c through g).

mold throughout the years. The Supreme Court, as recently as 1961, clarified the jurisdiction of FPC to regulate end uses and prices in certain direct sales. *Transcontinental Gas Pipe Line Corp., supra.* Therefore, this Court finds appropriate the overruling of these disclaimers on the grounds stated in the Commission's Order (App. 305, para. 38): "Partly as a result of a modified statutory standard and partly as the product of accumulated experience."

Finally, the Court rejects the argument of appellant that there is no prior administrative error here for the Commission to overrule, because the Third Circuit has approved these precedents in *Public Service Electric & Gas Co.* v. *FPC,* 371 F.2d 1, 5 (3rd Cir. 1967). In that case, however, natural gas was being taken as a bailment by Transcontinental Gas Pipe Line Corporation to Texaco's plant terminus in West Deptford, New Jersey. The interstate transportation by Transcontinental admittedly was subject to Commission regulation. The sole issue presented, therefore, was whether Texaco's transmission of the gas through its own 4-mile long pipeline located solely within the state of New Jersey was subject to the Commission's jurisdiction as well. The Commission determined that the transportation by Texaco was not subject to the Commission's jurisdiction since the "pipeline was an integral part of its plant facility and that interstate commerce ceased when the transported gas was re-delivered at the terminus" (at 5). The Court agreed with this decision under those specific circumstances. It mentioned the disclaimers at issue here, as supportive of its decision; but its comment was merely dicta and cannot support the assertion of appellant that these disclaimers have been endorsed by the Court in every situation. The court there was not presented with the present issue and did not decide it.

COMMISSION'S DUAL ROLE.

International's second contention alleges that the General Counsel and possibly other FPC employees participated in both the prosecution of the proceeding against

International and in the ultimate formulation of the Commission's decision. It claims this procedure to be violative of the general conceptions of due process, in addition to the statutory prescriptions of APA § 554(a) and (d). Without delving into a consideration of whether International has successfully brought itself within the shelter of this statute, or is otherwise entitled to constitutional protection, by showing that this is an adjudicatory proceeding and not one for initial licensing, the Court dismisses this contention of the appellant on the grounds that it has condoned and waived this point. The alleged procedural violation was raised initially at the time of the rehearing, when correction was impossible. However, International represents that it was under no obligation to object earlier, because it had no notice of this irregularity until it learned that the General Counsel had failed to exclude himself from the decision making session of the FPC on July 29, 1969. The petition for rehearing filed August 28, 1969, first broached the issue; and at that time indicated no new evidence had been discovered. International's claim was that it had been "informed and believes that under the practice followed in the conduct of the Commission's business" this irregularity had occurred (at 354). As a matter of fact, International's counsel was unusually well informed as to the Commission's regular procedures, for he had served as an employee of the Commission for some 30 years. A considerable part of this time, he had occupied the position of Assistant General Counsel or as its Solicitor and was thoroughly familiar with all of the intricate facets of the Commission's administrative procedures.

Appellant made no timely challenge to this purported practice nor did counsel call it to the attention of the Commission at the time the stipulation of facts agreed to had been reviewed and approved by the Assistant General Counsel and General Counsel, before the supposed error was committed. This knowing inaction and calculated lying in wait, taken with the hope of upsetting a future adverse decision of the Commission, constitute a waiver of ap-

pellant's rights. As was pointed out in the case of *SEC* v. *R. A. Holman & Co.*, 323 F.2d 284 (D.C. 1953) (Burger, *J.*), which involved a challenge to a Commission member on the basis of conflict of interest:

> "The party asserting disqualification must make his record in the administrative hearing. While the scope and nature of that inquiry has never been fully delineated it must be sufficient to allow the challenging party to introduce whatever relevant evidence he possesses bearing on disqualification since he, of course, has the burden of proof" (at 287).

Furthermore, all the factual issues had been stipulated to. International cannot claim now that any prejudice resulted from the alleged error, in allowing the General Counsel or his assistant to approve the stipulation of facts and thus be accused of participating in the disposition of the case in a dual capacity, contrary to the statute.

Freedom of Information Issue

International requested in the District Court case that the Commission should be ordered to disclose all staff memoranda transmitted to it, from its General Counsel or its Bureau of Natural Gas in four separate matters, where it was claimed that the Commission's action favored the legal position taken by International here. These included: *Anchor Hocking Glass Corporation*, 2 F.P.C. 930 (1941); *Jersey Central Power & Light Company*, 9 F.P.C. 717 (1950); *Montana Power*, 10 F.P.C. 950 (1957); and a letter from Reynolds Metal Co. and FPC's response on March 6, 1959 and March 27, 1959, respectively.

International maintains that these records should have been made available to it under FIA § 552(a)(3) which requires:

> "(E)ach agency, on request for identifiable records made in accordance with published rules stating the time, place, fees to the extent authorized by statute,

and procedure to be followed shall make the records promptly available to any person."

The Commission took the position that it had the right to reject this request pursuant to FIA § 552(b)(5), which provides:

"This section does not apply to matters that are—

. . .

"(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency."

In other words, the position which the Commission adopted was simply that the same Federal Rules of Civil Procedure, applicable to discovery in civil suits in the District Courts, determined whether Commission records were required to be made available to the movant under FIA.

Applying these standards, the District Court found that the material sought by the appellant were not "orders" of the Commission nor were they "necessary parts" thereof. We agree with this finding, because the views of individual members of the Commission's staff are not legally germane, either individually or collectively, to the actual making of final orders. They could be grossly misleading, when applied to the ultimate findings and conclusions reached by the FPC as a whole, because at best they are only advisory in character.[3] To allow disclosure of these documents would

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[3] The Memoranda sought were:

(1) Memoranda from General Counsel or an Assistant General Counsel to the Commission or to a Commissioner which memoranda include legal analysis and recommendations, legal conclusions, and policy recommendations;

(2) Memoranda from the Bureau of Accounts, Finance and Rates to the Commission which memoranda contain legal conclusions (or suggest a legal conclusion) and recommendations;

(3) A Memorandum from the Division of Licensed Projects to the Commission, dated March 22, 1951, described certain oil

interfere with two important policy considerations on which § 552(b)(5) is based: encouraging full and candid intra-agency discussion, and shielding from disclosure the mental processes of executive and administrative officers. See *Carl Zeiss Stiftung* v. *V. E. B. Carl Zeiss, Jena,* 40 F.R.D. 318 (D.D.C. 1966), *aff'd* sub nom. *V. E. B. Carl Zeiss, Jena* v. *Clark,* 384 F.2d 979 (D.C. Cir. 1967). These policies are analogous to those underlying the attorney-client privilege, and appellant fails to show a compelling need for disclosure of the documents herein.

There is embodied in § 552(b)(5) "the privilege, customarily enjoyed by the Government in its litigations, against having to reveal these internal working papers, in which opinions are expressed and policies formulated and recommended." *Ackerly* v. *Ley,* 420 F.2d 1336 (D.C. Cir. 1969). See also, *Consumers Union* v. *Veterans Administration,* 301 F. Supp. 796 (S.D.N.Y. 1969), *appeal dismissed as moot,* Docket Nos. 33978 and 34160 (2d Cir., Jan. 15, 1971). The appellant's requested discovery must be denied under the fifth exception, because its seeks the disclosure of items used in the FPC's deliberative processes.

International contends that since the disclaimers cannot be fully understood without reference to the staff memoranda, these memoranda must be disclosed under FIA § 552 (a)(2) as final orders. However, the staff memoranda sought can in no way be construed, as being a part of the Commission's final orders. They were merely preliminary

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and gas fields, leases and production in the area affected by the application, in response to a request of the Commission; and

(4) A Memorandum from the Bureau of Rates and Gas Certificates to the Commission, dated March 20, 1951, containing a description of the applicant's proposed operation, discussion of legal precedents, an opinion as to jurisdiction, and a request for advice as to what reply should be made to applicant's inquiry.

inter-agency memoranda, compiled preparatory to the formulation of the Commission's final decisions. *American Mail Line, Ltd.* v. *Gulick*, 411 F.2d 696 (D.C. 1969), relied on as precedent by the appellant is not apposite. In that case, the memorandum sought was incorporated into the final order and administrative decision of the agency; and was specifically referred to as the sole basis for its decision. Thus "(w)hen it chooses this course of action 'as a matter of convenience' . . . the memorandum lost its intra-agency status and became a public record, one which must be disclosed to appellants" (at 703). The Court, in that case, specifically stated that it was "a unique case, and must be dealt with as such" (at 701).

International's contention that the staff of the Commission is an "agency" as defined in 5 U.S.C. § 551(1) is not tenable. As the District Court so properly pointed out:

> "There is no organization designated 'the Staff' nor any justification for the capital letter; there are employees of the Commission called collectively 'the staff' but they have no authority individually or collectively to make 'orders.' Only the Commission makes orders."

The Commission's decision appealed from and the judgment of the District Court are accordingly affirmed.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the second day of March, one thousand nine hundred and seventy-one.

Present: HON. J. EDWARD LUMBARD, *Chief judge,*
HON. WILFRED FEINBERG, *Circuit Judge,*
HON. T. EMMET CLARIE, *District Judge.*

INTERNATIONAL PAPER COMPANY, *Petitioner,*

v.

FEDERAL POWER COMMISSION, *Respondent.*

A petition for review of orders of the Federal Power Commission.

This cause came on to be heard on the certified list of items comprising the record of the Federal Power Commission and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged and decreed that the petition for review be and it hereby is denied and that the orders of the Federal Power Commission be and they hereby are affirmed in accordance with the opinion of this court with costs to be taxed against the petitioner.

/s/ A. DANIEL FUSARO
Clerk

(Seal)

A true copy,

A. DANIEL FUSARO
Clerk

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the second day of March, one thousand nine hundred and seventy-one.

Present: Hon. J. Edward Lumbard, *Chief Judge,*
Hon. Wilfred Feinberg, *Circuit Judge,*
Hon. T. Emmet Clarie, *District Judge.*

International Paper Company, *Plaintiff-Appellant,*

v.

Federal Power Commission, *Defendant-Appellee.*

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed in accordance with the opinion of this court.

/s/ A. Daniel Fusaro
Clerk

(Seal)

A true copy,

A. Daniel Fusaro
Clerk

APPENDIX B

Opinion and Orders of the Federal Power Commission

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Certificate—Pipeline
Transportation—Freedom of Information Act
Jurisdiction—Natural Gas Act Sections 7(c) & (e)
Transportation in Interstate Commerce

Before Commissioners: Lee C. White, Chairman; L. J. O'Connor, Jr., Carl E. Bagge, John A. Carver, Jr., and Albert B. Brooke, Jr.

Docket No. CP68-62

INTERNATIONAL PAPER COMPANY

OPINION NO. 563

OPINION AND ORDER FINDING JURISDICTION

(Issued July 29, 1969)

CARVER, Commissioner:

1. These proceedings have their inception in the Commission's order of September 5, 1967 (38 F.P.C. 574) directing the International Paper Company (IP) to show cause why its transportation of natural gas from Lake St. John Field, Louisiana, to its manufacturing plant near Natchez, Mississippi, should not be subject to this Commission's jurisdiction under Section 1(b) of the Natural Gas Act, and why IP should not be required to apply for and obtain a certificate of public convenience and necessity under Sections 7(c) and (e) of the Act to operate said transmission line.

2. IP filed its response to the above order on October 13, 1967, denying any basis for jurisdiction in general terms and moving that the Commission issue a summary dis-

claimer of jurisdiction. The latter motion was denied by Commission order dated May 13, 1968 (39 F.P.C. 696), which order also set a date and time for prehearing conference at which time counsel for IP and Staff submitted an agreed stipulation of facts (Tr. 31ff.).

3. The need for a formal hearing being thus obviated, Presiding Examiner Francis L. Hall arranged for the filing and exchange of briefs and thereafter proceeded to his Initial Decision, issued December 13, 1968. That decision reached findings to the effect that (a) IP is a "natural gas company" subject to the Commission's jurisdiction by virtue of its transportation of natural gas from Louisiana to Mississippi, (b) IP should be required to file for a certificate of public convenience and necessity pursuant to Section 7(c) of the Act, and (c) the sale of gas by the producer (Humble Oil & Refining Company) is not jurisdictional except insofar as Section 7 requires a certificate for transportation of gas pursuant to the sale. Subject to Commission review, IP was ordered to file application for the required certificate of public convenience and necessity.

4. The matter is here for review of that Initial Decision in the light of IP's exceptions filed January 13, 1969, and Staff's brief in opposition thereto, filed February 3, 1969.

Factual Background

5. International Paper Company, Respondent herein, is the world's largest producer of paper and paperboard products. Since 1949, it has conducted a major bleached pulp and dissolving cellulose production operation at Natchez, Mississippi. From its inception and through a series of expansions, the energy source for this industrial enterprise has been natural gas.

6. Until 1964 all natural gas requirements for the plant were secured by direct purchase from an interstate gas pipeline serving customers in Mississippi and Louisiana from gas supplies acquired in Northern Louisiana fields,

including the Lake St. John field in Concordia and Tensas Parishes. The pipeline company involved has been regarded at all times as a "natural gas company" subject to jurisdiction under the Natural Gas Act, although it has passed through several changes of corporate identity.[1] In 1963 and currently, the line is owned and operated by Humble Gas Transmission Company.

7. By letters of intent and other agreements in writing dated September 16, 1963, however, IP arranged to secure a substantial part of its gas requirements by direct purchase from Humble Refining,[2] taking delivery at the tailgate of a plant operated by the California Company (Calco) in the Lake St. John Field. Calco holds the majority interest in that field, with Humble Refining having the only other substantial interest. At the same time, Humble Refining agreed to construct, on IP's behalf, a new and separate 6⅝-inch pipeline from the processing plant to IP's mill at Natchez, a distance of 17.83 miles.

8. The finally agreed cost of the line, $450,573.10, was borne by Humble Refining, to be amortized out of the price

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[1] In point of fact, the pattern of corporate affiliation has accomplished a complete cycle. The original operator of the interstate transport facility was Interstate Natural Gas Co., a Delaware corporation organized in 1926. Its activities were initially subjected to our jurisdiction under a certificate issued in 1948 (7 F.P.C. 588) under the "grandfather" provision of the amendments to Section 7. The controlling interest in Interstate Natural was held by Standard Oil Company of New Jersey until sold in 1953 to a minority interest holder, Olin Interstate Corp., with the approval of this Commission (13 F.P.C. 1012). At some later time not of record here, ownership was transferred again, this time to Humble Gas Transmission Co., a wholly owned Standard of New Jersey subsidiary and an affiliate of Humble Oil & Refining Co., the current source of International Paper's gas supply.

[2] On the same date, IP's contract with Humble Transmission was amended to permit IP to purchase gas from suppliers other than Humble Transmission. The terms of this option were such as to indicate that IP was being encouraged to find a substitute or supplemental source of gas.

of gas to be delivered to IP over a fifteen-year period. The completed pipeline, together with rights-of-way and permits, was conveyed to IP by Humble Refining's subcontractor on February 26, 1964, and IP began transmission operations early in the following month.

9. IP's gas purchases from Humble Transmission exceeded 8.8 billion cubic feet in 1963 (the last full year that Humble Transmission acted as sole supplier), and have steadily decreased since that date. Deliveries in 1967 were less than one-fourth the 1963 peak. On the other hand, direct purchases from Humble Refining increased from 2.9 billion cubic feet in the first year (1964) to 6.6 billion in 1967.

10. The terms and conditions of the various gas purchase contracts IP negotiated between 1949 and the present, including price, volumes and options, are set forth in the record and discussed at some length in the Initial Decision. Since these details are not directly involved in the jurisdictional issue before us, no purpose would be served by further repetition.

Discussion

11. The issues presented here, at least on the surface, seem to be simple ones writ large. There are no intervenors or collateral interests involved; only Respondent and Staff have appeared or submitted argument. The factual points are wholly uncontroverted; indeed, they were stipulated before the Examiner in a scant six pages of the transcript. The legal issue is quite simple and straightforward; is IP's transportation of natural gas, under conditions described above, subject to our jurisdiction and must it secure a certificate authorizing such transportation?

12. Yet we have been favored with a cumulative total of 325 pages of briefs, and the Examiner has set forth his conclusions in an Initial Decision which is 28 pages in length. Additionally, the matter has been before the Com-

mission at least five times for consideration and disposal of various motions, petitions and other interlocutory proceedings. On the basis of what has transpired to date, therefore, the problem of what decision to reach may be less difficult than that of keeping discussion within reasonable limits.

13. IP's exceptions to the Initial Decision involve four basic points, as follows:

1. The interstate flow of natural gas does not, *per se*, establish jurisdiction.

2. The possible indirect effects on producer prices or other factors affecting interstate sales afford no valid basis for exercise of jurisdiction.

3. The tests of jurisdiction previously followed by the Commission or the courts are not met in this instance.

4. The Examiner erred in denying disclosure of Staff recommendations and analyses in previous disclaimer cases.

Disclosure of Staff Recommendations

14. We dispose of the disclosure issue first. This is the fourth occasion on which Respondent has advanced this point in this proceeding. Its prehearing petition to this effect dated September 25, 1967, was denied by Commission order of October 9, 1967 (38 F.P.C. 825). On petition for rehearing, reversal, and expansion to cover other documents, dated November 2, 1967, the Commission again denied access to the requested materials by order issued November 30, 1967 (38 F.P.C. 1102). The disclosure issue was referenced, renewed and restated at not less than five points in Respondent's brief before the Presiding Examiner, filed on September 20, 1968.

15. Relying on the Commission's prior orders, the Examiner has again denied the request. The extensive

consideration reflected in the orders of October 9 and November 30, 1967, supplemented by the Examiner's further discussion of the issue, leads up to the same conclusion and the request is denied, with presumed finality.

Transportation in Interstate Commerce

16. Turning now to the substantive questions at issue, it has long been settled that this Commission's jurisdiction under the Natural Gas Act extends to three things and three things only: the sale of natural gas in interstate commerce for resale, the transportation of natural gas in interstate commerce, and "natural-gas companies" which, by definition, must be engaged in one or both of the first two activities. *Panhandle Eastern Pipeline Co.* v. *PSC of Indiana* (1947), 332 U.S. 507, 516. There is a complete agreement here that no "sale for resale" is involved. Therefore if jurisdiction exists and IP is to be held a natural-gas company, the basis must be found in the transportation factor. Mere carriage of natural gas is not enough, moreover, for the transportation must be "in interstate commerce."

17. In the Supreme Court's most recent consideration of this portion of the Act, it is made indelibly clear that the Commission has "jurisdiction over interstate transportation of natural gas as a separate and distinct matter, whether the transportation is for hire or for sale and whether the sale is for consumption or resale." *United Gas Pipeline Co.* v. *F.P.C.* (1966), 385 U.S. 83, 89. Of course, this definition of authority cannot be snatched out of its statutory context; the separate and distinct transportation factor must still be "in interstate commerce" as the Court makes clear by its reference to hire and sale as the objects of transportation. But these examples of "commerce" do not exclude all others; as the same case makes quite evident, the purchase of gas may constitute an essential and integral part of the jurisdictional process.

18. The central and most critical point in IP's rebuttal is that the Initial Decision errs in its theory "that any transportation of natural gas flowing interstate is, in and of itself, 'transportation of gas in interstate commerce.'" But we do not read the Examiner's Decision as broadly as Respondent has paraphrased it. To the contrary, by reference to *Gibbons* v. *Ogden* and other classic precedents on the nature of "commerce" within the constitutional phrase, he makes it amply clear that he was applying well established concepts that trade, commerce, business intercourse or a variety of other synonymous terms may and do occur as a constant stream. The process cannot be segmented into a series of individual transactions, divided by state lines, as Respondent would have us do here to avoid the natural consequences of the fact situation.

19. The carriage of gas across state lines is interstate by definition. IP contends, however, that "commerce" ceases before any transportation occurs; therefore only half of the statutory standard has been met. We disagree on the ground that the transportation involved is only a part, albeit an essential part, of a comprehensive commercial pattern involving (a) purchase of gas, (b) to be transported interstate, and (c) for use in a major commercial enterprise. In short, IP purchases natural gas from a producer in Louisiana for the express purpose of transporting it to another state. It has been established for thirty years that a purchase in contemplation of interstate transport is an integral element of "interstate commerce" for the purposes of a Federal regulatory statute. *Currin* v. *Wallace* (1939) 306 U.S. 1, 10.

20. IP's second line of argument under this heading is that the Commission has been specifically denied jurisdiction under circumstances allegedly similar to those prevailing here. For this purpose, primary reliance is placed on *Panhandle Eastern Pipeline Co.* v. *Michigan PSC* (1951) 341 U.S. 329. This is a burden too heavy for *Panhandle-Michigan* to bear.

21. That case and its immediate predecessor, *Panhandle-Indiana,* involved interposition of the Natural Gas Act as a device to prevent state regulation of direct industrial sales by an interstate pipeline. In each instance, the regulatory agency of a state had acted unequivocally with respect to intrastate sales or "local distribution," an area exempt from Federal legislation. The cases stand for the basic principle of dual, complementary and comprehensive regulation.

22. No question was raised there concerning Federal jurisdiction over the interstate transportation of gas, which is at the core of this case. Indeed in *Panhandle-Michigan* it was specifically held that "the sale to industrial consumers as proposed by appellant is clearly interstate commerce" (at p. 333). Here there is no sale as a part of local distribution. Unless subject to this Commission's jurisdiction there would be no public surveillance at all over the disposal of billions of cubic feet of natural gas each year. No principle is better settled nor more frequently reiterated than that Congress did not intend to leave "attractive gaps" in the regulatory scheme set forth in the Natural Gas Act. We think that the policy underlying and reflected in *Panhandle-Michigan* argues against, rather than for, Respondent's contentions.

23. While IP cites *F.P.C.* v. *Trancontinental Gas Pipeline Co.* (1961) 365 U.S. 1 (*Transco X-20*), its brief on exceptions does not rely on that precedent as heavily as in earlier phases of the proceedings, and understandably so. For the *Transco X-20* situation and that which exists here are essentially identical. In each a major industrial energy user purchased gas from a producer in one state for transportation to and consumption in another. The sole distinction lies in IP's ownership and operation of the pipeline facility, whereas Consolidated Edison utilized the contractual services of an existing pipeline carrier for that purpose. No serious doubt or question seems to have

existed about the need for a Section 7 certificate for the transportation phase of the *Transco X-20* transaction. We think that is equally the case here.

INDIRECT EFFECTS ON PRODUCER RATES, ETC., AS A BASIS FOR JURISDICTION

24. IP's second principal basis of exception seems to construe the Initial Decision as equating the need for regulation with the jurisdictional authority for such action. If that were the case, we would agree with IP's conclusion that this is improper; but we do not so read the Examiner's decision.

25. The Initial Decision's discussion (pp. 15-17) of the results which might flow from unregulated industrial sales is, in fact, largely irrelevant to the limited issues of this proceeding. Such factors constitute reasons for the exercise of jurisdiction once discovered, not a substitute for it. They must be evaluated fully in reaching a determination of public convenience and necessity, *Atlantic Refining Co.* v. *Public Service Comm.* (1959) 360 U.S. 378, 391, in the process of exercising valid jurisdiction.

26. We interpret the Initial Decision in that light. Having found IP's pipeline activity jurisdictional as "transportation of natural gas in interstate commerce," there was and is no need to buttress that conclusion by reference to possible indirect impact on jurisdictional producer sales.

27. That portion of the Decision qualifies as interesting dictum. It was unnecessary to the conclusion reached therein, and is equally so here, except in providing perspective as to the changing pattern of interpretation that has characterized the history of the Natural Gas Act. It will be time enough to weigh the relevant factors bearing on the public interest when an application for certificate is under consideration.

PREVIOUS TESTS OF JURISDICTION

28. Finally, IP asserts that the facts of this case do not meet the test of jurisdiction as laid down in prior judicial determinations and that the decisional law of the Commission's own precedents requires a disclaimer of jurisdiction.

Judicially Established Criteria

29. Under the first of the above categories of exception, IP focuses upon *Illinois Natural Gas Co.* v. *Central Illinois Public Service Co.* (1942) 314 U.S. 498, and *F.P.C.* v. *East Ohio Gas Co.* (1950) 338 U.S. 464, as establishing the metes and bounds of Federal regulatory jurisdiction. It is perhaps enough to note that neither of these cases is addressed to the "separate and distinct matter" of transportation and certification thereof under Section 7 of the Act as it is now constituted and interpreted. Additionally, however, *Illinois Natural* was decided before the 1942 amendments to Section 7 had been enacted (Act of February 7, 1942, 56 Stat. 83 15 U.S.C. 717f). In any event, the case held that Federal jurisdiction over the extension of interstate pipeline facilities was plenary. IP is apparently relying on isolated statements in the nature of dicta to the effect that the Natural Gas Act was primarily concerned with "rates." We find no merit in that contention; even if that had been a plausible view in early 1942, it has been superseded by subsequent legislative action, as confirmed in *UGPL* v. *F.P.C.* and *Transco X-20, supra.*

30. *East Ohio* is equally lacking in persuasion. That case extended Federal jurisdiction closer to the "burner tip" than any before or since, so much so that it led directly to legislative redefinition in the Hinshaw Amendment (Act of March 27, 1954, 68 Stat. 36, 15 U.S.C. 717(c)). It is not contended here that the prerequisites for exemption under that amendment have been met. Even more than

Illinois Natural, East Ohio recognizes the separate power to regulate interstate transportation and cites the 1942 revision as "broadening the Commission's powers over the construction or extension of pipelines."

31. We find no "tests" in these cases which inhibit in any way our authority to reach the activity in which IP is engaged.

The Decisional Law in Related Cases

32. IP's most direct and relevant attack on our jurisdiction consists of a confrontation with earlier Commission precedents, only one of which was exposed to judicial scrutiny. In that connection, it is contended that "the *Transco-Texaco*[3] case is controlling here." To the extent that the interstate carriage of gas owned by Texaco was held to require a certificate, we agree—and propose to place no greater burden on IP.

33. But IP seeks to equate its situation with that of Texaco with reference to the stub pipeline operated by Texaco from its interconnection with Transco's transmission line to its refinery site, a distance of four miles and all within the State of New Jersey. Under the facts of that case, moreover, Texaco was the producer-owner of the gas in question; there had been no purchase or sale of natural gas, but a bailment of a fungible commodity for the sole purpose of transport. The "commerce" involved was limited to "transportation for hire" and was complete upon redelivery to the owner within the state where use occurred.

34. The differences are glaringly self-evident. IP's transportation of gas after purchase is clearly interstate. From the acceptance of delivery there is no break in the

[3] Transcontinental Pipeline Co., 33 F.P.C. 237, *aff'd sub nom.* Public Service Electric and Gas Co. v. F.P.C. (1965), 371 F. 2d 1, *cert. den.* (1967) 389 U.S. 849.

stream of commerce until the product arrives at its destination across the state line. Jurisdiction to the extent that requires certification of the transport facility is therefore inescapable.

35. Turning now to the precedent effect of the Commission's own prior actions, IP cites four cases as constituting a barrier to jurisdiction here: *Anchor Hocking Glass Corp.*, 2 F.P.C. 930; *Jersey Central Power and Light Co.*, 9 F.P.C. 717; *Montana Power Co.*, 10 F.P.C. 950; and an unreported letter order of March 6, 1959 in *Reynolds Metals Company.*

36. *Jersey Central* appears not to be factually identical with the others in this group. The facility involved therein was an extension of a previously certificated line, the extension solely to serve applicant's electric generating plant. No purchase or sale of gas was involved and all of the facilities were located within the State of New Jersey. The case is therefore substantially parallel to that in *Transco-Texaco* so that disclaimer was appropriate on that ground.

37. *Anchor Hocking* and the others cited are, however, in direct conflict with requirement of a certificate here. As in the case of *Illinois Natural, supra, Anchor Hocking* was considered and disclaimer granted before the 1942 revision of Section 7 was enacted and a scant three years after original enactment of the Natural Gas Act. Through the succession of cases that have placed more and more emphasis on the transportation element of jurisdiction, what may have seemed a wholly private matter in 1941 is now recognized as having broad implications for the public convenience and necessity. The gap in regulatory experience that existed a generation ago has been superseded by concern over an "attractive gap" in the regulatory scheme of things. *Montana Power* and *Reynolds Metals*, while later in time, merely follow the earlier precedent uncritically.

38. Partly as the result of a modified statutory standard and partly as the product of accumulated experience, we find *Anchor Hocking* no longer appropriate to the needs of this period. To the extent that it is inconsistent with the views and conclusions we now express, it will no longer be followed as guiding precedent.

39. If serious doubt ever existed about our authority to abandon outmoded concepts, it is now demonstrably clear that this Commission is free, indeed may have a mandatory duty, to "modify its doctrine or even change its policy" in appropriate circumstances. *Atlantic Seaboard Corp.* v. *F.P.C.* (1968) 404 F.2d 1268.

40. That this is a constant and on-going process is clearly demonstrated by our recent decisions on the subject matter at hand. *Blue Dolphin Pipe Line Co.*, 33 F.P.C. 1141, following close on the heels of *Transco-Texas*, authorized a certificate covering the carriage of gas from offshore wells to shoreside industrial plants; both the gas and processing plants were the property of the pipeline's parent corporation (Shell Oil Co.). Similarly, in *Chandeleur Pipe Line Co.*, Docket No. CP69-67, Opinion No. 560, issued July 2, 1969, a subsidiary pipeline carrier received a certificate to carry its parent's gas from the Federal offshore domain for use in a refinery operated by an affiliate. To the extent that *stare decisis* gives shelter and comfort, therefore, our holding here is something less than a brave new world. Even if we were not inclined to overrule *Anchor Hocking*, as we expressly do, ample counterbalancing precedent has already been created.

Conclusion

41. Based on full and detailed examination of the record, as reflected in the above discussion, we concur in and approve the findings of the Presiding Examiner and confirm the order resulting therefrom.

The Commission therefore orders:

(A) That within 30 days after issuance of this order, International Paper Company shall file an application for a certificate of public convenience and necessity, pursuant to Section 7(c) of the Natural Gas Act, for authority to continue operation of its natural gas transmission line between Tensas Parish, Louisiana, and its pulp mill in Adams County, Mississippi.

(B) All exceptions not granted are denied.

By the Commission,

(SEAL)

GORDON M. GRANT,
Secretary.

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: John N. Nassikas, Chairman; L. J. O'Connor, Jr., Carl E. Bagge, John A. Carver, Jr., and Albert B. Brooke, Jr.

Docket No. CP68-62

INTERNATIONAL PAPER COMPANY

Order Denying Petition for Rehearing, Oral Argument, Further Disclosure and Ancillary Hearing; Granting Stay Pendente Lite

(Issued September 24, 1969)

On August 28, 1969, International Paper Company (IP) filed herein a Petition for Rehearing, Oral Argument, Further Disclosure and Ancillary Hearing, and *Stay Pendente Lite* as to Opinion No. 563, issued July 29, 1969.

In Opinion No. 563, the Commission held that the Petitioner's ownership and operation of a natural gas pipeline to transport gas purchased in Louisiana for use in Petitioner's own industrial plant in Mississippi constituted "trans-

portation of natural gas in interstate commerce'' and thus required a certificate of public convenience and necessity under Section 7(c) of the Natural Gas Act.

The Commission finds:

The grounds for rehearing contained in the petition dated August 28, 1969, set forth no new facts or principles of law which were not fully considered by the Commission when it issued its Opinion and Order on July 29, 1969, or which having now been considered, warrant any modification or reversal of said opinion and order. The thirty-day period for filing application for a certificate, as specified in Opinion No. 563, has been consumed by preparation and consideration of this petition, therefore, the Petitioner should be allowed an extension of time for compliance with the Commission's order.

The Commission orders:

(A) The above mentioned petition for rehearing of the Commission's Opinion No. 563 and Order issued July 29, 1969, is hereby denied as to all matters specified in the petition except the request for a *Stay Pendente Lite* which is granted, as provided in paragraph (B) below.

(B) The provision requiring International Paper Company to file an application for a certificate of public convenience and necessity in ordering paragraph (A) accompanying Opinion No. 563 is stayed until 60 days from the date of this order provided, however, if IP within that time files a petition for court review of that opinion and order, the requirements hereby are further stayed until 20 days after the issuance of final mandate upon completion of such court review.

By the Commission.

(SEAL)

GORDON M. GRANT,
Secretary.

FEDERAL POWER COMMISSION
WASHINGTON, D. C. 20426

SEC
Docket No. CP68-62
International Paper Company

Nov. 13, 1969

Howard E. Wahrenbrock, Esq.
605 RCA Building
1725 K Street, N.W.
Washington, D. C. 20006

Dear Mr. Wahrenbrock:

On October 15, 1969, you tendered for filing on behalf of the International Paper Company what purports to be a petition for rehearing of the Commission's "Order Denying Petition for Rehearing, Oral Argument, Further Disclosure and Ancillary Hearing; Granting Stay Pendente Lite," issued September 24, 1969, in the above-designated matter.

Since the order denying rehearing did not change the result of Opinion No. 563 or the order therein, there is no provision in the Commission's Rules of Practice and Procedure for the filing of such a second petition for rehearing. In view thereof, the Commission takes no cognizance of the tendered filing made on October 15, 1969.

By direction of the Commission.

/s/ GORDON M. GRANT
Secretary

APPENDIX C

Opinion and Judgments of the United States District Court for the Southern District of New York

APPEARANCES:

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WYATT, District Judge,

This is a motion by defendant Federal Power Commission (the Commission) for an order dismissing the action for failure of the complaint to state a claim upon which relief can be granted (Fed. R. Civ. P. 12(b)(6)) or in the alternative for summary judgment in favor of the Commission (Fed. R. Civ. P. 56).

It is agreed by both sides that there is no genuine issue as to any material fact. An affidavit is submitted of the Secretary of the Commission.

Summary judgment must be rendered in favor of the Commission.

The action is brought under Freedom of Information Act (5 U.S.C. § 552; "the Act") for an order that the Commission produce certain of its records claimed to be improperly withheld (5 U.S.C. § 552(a)(3)).

Plaintiff International Paper Company (IP) is engaged in a controversy with the Commission over a pipeline, some 18 miles long through which IP brings natural gas from Louisiana across the river to one of its mills near Natchez, Mississippi, for use as fuel there. The Commission asserts that it has jurisdiction over IP as a "natural gas company" under the Natural Gas Act (15 U.S.C. § 717 and following) because of the operation of the pipeline; IP denies that there is any such jurisdiction.

In 1965 the Secretary and an Assistant General Counsel of the Commisison in correspondence with IP asserted that the pipeline was subject to the jurisdiction of the Commission and that a certificate of public convenience and necessity was required. IP in letters denied this.

It is said by IP that this is the Commission's "published method of functioning (18 CFR § 3.161)" (complaint para. 7). An initial classification is made on the basis of available information "supplemented when necessary by staff investigation". (18 CFR § 3.161)

The technical phases are done by BNG (Bureau of Natural Gas, a part of the Commission's staff) and the "legal phases" by OGC (Office of the General Counsel, another part of the Commission's staff). 18 CPR § 3.161.

In May 1967, a member of the Commission's staff raised the point again and counsel for IP wrote to the Secretary denying jurisdiction.

The Commission issued September 5, 1967 an order requiring IP to show cause why the pipeline was not subject to jurisdiction and why IP should not be required to obtain a certificate.

IP then asked the Commission, by petition filed September 25, 1967, to disclose "all staff memoranda to the Com-

mission that contain any recommendation of action, any representation of fact, or any discussion of fact or law" underlying orders of the Commission in three proceedings made in 1941 (Anchor Hocking Glass Corp.), 1950 (Jersey Central Power & Light Co.), and 1951 (Montana Power Company).

The Commission denied this request by order issued October 9, 1967.

By petition filed November 2, 1967, IP asked for a rehearing and also for the disclosure of the same type of staff memoranda underlying an order of the Commission in 1959 (Reynolds Metal Company).

By order issued November 30, 1967, the Commission denied the petition for rehearing and for disclosure of the additional memoranda.

By motion filed October 13, 1967, IP asked "for a summary disclaimer of jurisdiction" by the Commission. This motion was denied by order issued May 13, 1968, "without prejudice to its renewal after completion of appropriate proceedings".

The Initial Decision of the Presiding Examiner was issued December 13, 1968 (42 FPC 258-272).

By order with opinion issued July 29, 1969, the Commission approved the findings of the Examiner that the operation by IP of its pipeline was subject to the Commission's jurisdiction (42 FPC 248-258). IP was ordered to apply for a certificate of public convenience and necessity. The Commission denied IP's request for disclosure of the staff memoranda in the four earlier cases; this request had been made to and denied by the Presiding Examiner.

IP then filed August 28, 1969 a Petition for Rehearing. In this Petition, IP contended, among other things, that the procedure followed and the opinion and order of July 29, 1969 were unlawful because members of the staff of the

Commission "who had been engaged for it in investigative or prosecuting functions in the proceedings against [IP] had participated or advised in [the] Commission's decision of the same proceedings". This it was contended was in violation of 5 U.S.C. § 554(d), in relevant part as follows:

> "An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 557 of this title, except as witness or counsel in public proceedings."

As a further part of its Petition, IP asked that the Commission disclose the memoranda of the staff to the Commission "on" the petitions of IP filed September 25 and November 2, 1967 and the motion "for a summary disclaimer" etc. filed October 13, 1967. IP also asked that the Commission hold "an ancillary hearing" at which IP could introduce as to the staff participation matter.

By order issued September 24, 1969, the Commission denied the Petition for Rehearing and for the further relief above described.

IP then submitted on October 15, 1969, a Petition for Rehearing of the September 24, 1969 order denying Petition for Rehearing, etc. By letter dated November 13, 1969 the Secretary of the Commission advised counsel for IP that the Commission "takes no cognizance" of the October 15, 1969 document.

On November 21, 1969, IP filed in the Court of Appeals for this Circuit (in which IP has its principal place of business) a petition to review the order of the Commission issued July 29, 1969. That petition (Docket No. 34265) is now pending and has not been argued.

Also on November 21, 1969, IP filed in this Court the complaint in the case at bar. As to some of the records

sought—namely, those sought as to the petitions of September 25 and November 2, 1967 and the motion of October 13, 1967—it has been established by affidavit of the Secretary of the Commission that they do not exist; as to them the action is moot.

The records now sought in the action are described in the prayer for relief as all memoranda to the Commission from its office of General Counsel or Bureau of Natural Gas on

> "(b) The petition filed March 31, 1941, by Anchor Hocking Glass Corporation pursuant to which defendant issued its April 22, 1941, disclaimer of jurisdiction in its proceeding entitled *Anchor Hocking Glass Corporation,* Docket No. G-204, as reported at 2 F.P.C. 930;
>
> (c) The application filed February 10, 1950, by Jersey Central Power & Light Co. pursuant to which defendant issued its May 8, 1950, disclaimer of jurisdiction in its proceeding entitled *Jersey Central Power & Light Company,* Docket No. G-1324, as reported at 9 F.P.C. 717;
>
> (d) The application filed March 5, 1951, by the Montana Power Co. pursuant to which defendant issued its May 8, 1961, disclaimer of jurisdiction in its proceeding entitled *The Montana Power Co.,* Docket No. G-1627, as reported at 10 F.P.C. 950;
>
> (e) The letter dated March 6, 1959, from Reynolds Metals Company and defendant's response by letter of March 27, 1959, to Reynolds Metals Company signed by J. H. Gutride, Secretary, "by direction of the Commission" (exhibit B to this Complaint);"

It is established by affidavit of the Secretary of the Commission that the records thus sought consist of the following:

> memoranda from General Counsel or an Assistant General Counsel to the Commission or to a Commissioner

which memoranda include legal analysis and recommendations, legal conclusions, and policy recommendations;

Memoranda from the Bureau of Accounts, Finance and Rates to the Commission which memoranda contain legal conclusions (or suggest a legal conclusion) and recommendations;

a memorandum from the Division of Licensed Projects to the Commission, dated March 22, 1951, describing certain oil and gas fields, leases and production in the area affected by the application, in response to a request of the Commission; and

a memorandum from the Bureau of Rates and Gas Certificates to the Commission, dated March 20, 1951, containing a description of the applicant's proposed operation, discussion of legal precedents, an opinion as to jurisdiction, and a request for advice as to what reply should be made to applicant's inquiry (a copy of which inquiry is attached to Plaintiff's Complaint as part of Exhibit B).

The Commission properly contends that these records are within the specific exemption of the Act (5 U.S.C. § 552 (b)(5) as

> . . . intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency".

1.

The records sought are entirely irrelevant to any issue in the proceeding before the Commission or to the review in the Court of Appeals. There were no fact issues before the Commission. There was a stipulation of acts and a request from both sides that decision be on the basis of the facts so stipulated (42 FPC at 250, 261). The issue is solely one of law.

Apparently IP wishes to be able to use staff memoranda in earlier cases to show the Court of Appeals that the order as to IP is contrary to earlier decisions by the Commission, not reviewed by a Court of Appeals. If true, the showing would be meaningless since the Commission can surely depart from its own precedents and the Courts in any event have the final say. Moreover, the staff memoranda are not necessary to show that the Commission in the case of IP declined to follow its own precedents. This is frankly admitted by the Commission and the reasons given: "a modified statutory standard" and "The product of accumulated experience" (42 FPC at 257).

IP seems also anxious to show that individual staff members in the earlier cases took a different view of jurisdiction from that of the Commission or took the same view but on sounder grounds. While the collective opinions of a regulatory body may be given weight in the courts, surely there is no benefit in examining the views of individual members of the staff.

Even under the liberal discovery practice in the federal courts, these records seem beyond any possible relevance.

2.

As to all except one of the records in suit (that described in para. 4(c)(2) of the Secretary's affidavit), they seem to be advice on matters of law and would not be subject to discovery because of the attorney-client privilege.

3.

Aside from all else, the records seem clearly to be intra-agency exchange of views in the process of reaching an agency decision. As such, they are within the exemption quoted above from subsection (b)(5) of the Act.

Before the Act became effective on July 4, 1967 the District Court for the District of Columbia had held, citing many earlier decisions, that executive privilege protected

from disclosure "intra-governmental documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated". *Carl Zeiss Stiftung* v. *V. B. B. Carl Zeiss, Jena,* 40 F.R.D. 316, 324 (1966). After the Act became effective, there was a unanimous affirmance on the opinion below. 384 P.2d 979 (D.C. Cir., November 13, 1967, then Judge, now Mr. Chief Justice, Burger was a member of the panel), cert. denied, 389 U.S. 952 (1967).

More recently, the Court of Appeals for the District of Columbia Circuit has said (*Ackerley* v. *Ley,* 420 F.2d 1336, 1341, December 19, 1969):

> " . . . we accept the . . . contention that Exemption (5) was to reflect the privilege, customarily enjoyed by the Government in its litigations, against having to reveal those internal working papers in which opinions are expressed and policies formulated and recommended".

Nothing by our Court of Appeals on the subject has been found. Judge Croake appears to agree with the District of Columbia decisions. *Consumers Union* v. *Veterans Administration,* 301 F. Supp. 796, 804-05 (S.D.N.Y. 1969).

4.

The several contentions ably advanced for IP have been considered. They are ingenious but do not appear to be worthy of extended discussion.

It is simply not the fact that the records sought are "orders" of the Commission (5 U.S.C. § 552(a)(2)) or "necessary parts" thereof (IP Memo, p. 12). They are staff memoranda before the making of the "orders".

It is equally untrue that "the Staff" (IP Memo, p. 20) is an "agency" within the definition in 5 U.S.C. § 551(1). There is no organization designated "the Staff" nor any justification for the capital letter; there are employees of the Commission called collectively "the staff" but they

have no authority individually or collectively to make "orders". Only the Commission makes "orders".

There is no justification whatever for divorcing staff memoranda from the "decisional process" (IP Memo, p. 30) and likening them to "the record . . . utilized by the court in the process of reaching a decision" (IP Memo, p. 30). Any "record" of evidence is, of course, subject to disclosure; no one would contend otherwise. The staff memoranda here are exactly like memoranda from a law clerk to a judge.

5.

One of the memoranda sought, that from the Division of Licensed Projects in 1951 described in para. 4(c)(2) of the Secretary's affidavit, may not contain opinions or recommendations; it may be a straight factual description relating to the applicant in the Montana Power case. It was done, however, at the request of the Commission and may thus indicate the then attitude of the Commission, prior to making the final order, and be part of the process leading to decision.

It does not seem appropriate in any event to pursue this one memorandum in any detail because it is so completely irrelevant. Montana is one of the earlier cases which the Commission recognizes is "in direct conflict" with the decision as to IP, it followed "uncritically" the earlier cases (42 FPC at 257). Production of the memoranda could not establish the situation any better than the Commission's own statement.

The motion of the Commission is granted and the Clerk is directed to enter judgment in favor of defendant dismissing the action.

So Ordered.

Dated: New York, New York
May 15, 1970

Inzer B. Wyatt
United States District Judge

69 Civil 5169

INTERNATIONAL PAPER CO., *Plaintiff*,

–against–

FEDERAL POWER COMMISSION, *Defendant*

Judgment

The defendant having moved the Court for an order dismissing the action for failure of the complaint to state a claim upon which relief can be granted pursuant to Federal Rules of Civil Procedure, 12(b)(6), or, in the alternative for summary judgment, Federal Rules of Civil Procedure 56, and the said motion having come on to be heard before the Honorable Inzer B. Wyatt, United States District Judge, and the Court thereafter on May 15, 1970, having handed down its opinion granting said motion and directing the Clerk to enter judgment in favor of the defendant, it is,

ORDERED, ADJUDGED AND DECREED: That the defendant FEDERAL POWER COMMISSION, have judgment against the plaintiff, INTERNATIONAL PAPER CO., dismissing the complaint.

Dated: New York, N. Y.
May 18, 1970

/s/ JOHN LIVINGSTON, *Clerk*

APPENDIX D

The Statutory Provisions Involved

THE NATURAL GAS ACT, June 21, 1938, c. 556, §§ 1(a), 1(b), 7(c) in part, and 7(e), 52 Stat. 821-833, as amended, 15 U.S.C. §§ 717(a) and (b), 717f(c), and 717f(e):

§ 1.

(a) As disclosed in reports of the Federal Trade Commission made pursuant to S. Res. 83 (Seventieth Congress, First Session) and other reports made pursuant to the authority of Congress, it is declared that the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest, and that Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest.

(b) The provisions of this chapter shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.

* * * * * * * * *

§ 7.

* * * * * * * * *

(c) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the con-

struction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations * * *

Parts of sections 552(a), 552(b), and 554(d) of the ADMINISTRATIVE PROCEDURE ACT, Pub. L. 90-23, § 1, June 5, 1967, 81 Stat. 54; 5 U.S.C. § 552(a) and (b) and § 554(d):

§ 552.

(a) Each agency shall make available to the public information as follows:

* * * * * * * * *

(3) * * * [O]n request for identifiable records made in accordance with published rules stating the time, place, fees to the extent authorized by statute, and procedure to be followed, shall make the records promptly available to any person. On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo and the burden is on the agency to sustain its action. In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible employee, and in the case of a uniformed service, the responsible member. Except as to causes the court considers of greater importance, proceedings before the district court, as authorized by this paragraph, take precedence on the docket over all other causes and shall be assigned for hearing and trial

at the earliest practicable date and expedited in every way.

* * * * * * * * *

(b) This section does not apply to matters that are—

* * * * * * * * *

(5) inter agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

* * * * * * * * *

§ 554.

(a) This section applies, according to the provisions thereof, in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing * * *

* * * * * * * * *

(d) * * * An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 557 of this title, except as witness or counsel in public proceedings. This subsection does not apply—

(A) in determining applications for initial licenses;

(B) to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; or

(C) to the agency or a member or members of the body comprising the agency.

APPENDIX E

Extracts from IP's Brief in the Court Below

Pages 20-21:

[Footnote 45] * * * See also the following letter from the Commission's files that accidentally came to our attention.

July 13, 1948

The Consumers Company
East Vine Street and B. & O. R.R.
Lima, Ohio

Attention: Mr. Francis X. Ebner, Jr.

Gentlemen:

Reference is made to your letter of June 23, 1948, making inquiry concerning the jurisdiction of this Commission over a company which proposes to transport natural gas from the State of Oklahoma to Illinois and use such natural gas for its own consumption in industrial processing.

For your information there is inclosed an order of the Commission. In the Matter of *Anchor Hocking Glass Corporation,* Docket No. G-204, issued April 22, 1941, disclaiming jurisdiction over operations similar to those proposed by your company.

Very truly yours,

/s/ LEON M. FUQUAY
Secretary

Inclosure 1419
RLR:vld
7-12-48
RLR (s)
BR (s)
SAW (s)

Pages 28-29:

* * * * *

b. The FPC's assumption that it is free to overrule its previous decisions disclaiming jurisdiction assumes the question to be decided, *i.e.*, that those decisions were erroneous—that the Act confers jurisdiction over a consumer's own-use interstate transportation. We have already shown that the Act, read in the light of its legislative history, clearly does not confer that jurisdiction. But even if that were unclear, even if the Act's coverage were ambiguous, the Commission could not now undo the effect of its 31-year course of interpretation of the Act as excluding jurisdiction over such transportation. For such a course of interpretation is abundantly sufficient to resolve any statutory ambiguity there may be deemed to have been as to this kind of transportation. *Norwegian Nitrogen Products Co.* v. *United States*, 288 U.S. 294, 315 (1933); *United States* v. *Pub. Util. Comm. of Calif.*, 345 U.S. 295, 314-315 (1953); *FTC* v. *Bunte Bros.*, 312 U.S. 349, 352 (1941); *United States* v. *American Trucking Ass'ns.*, 310 U.S. 534, 549 (1940); *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965); *Power Reactor Development Co.* v. *Electricians*, 367 U.S. 396, 408 (1961); *cf.*, *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 290 (1948); *FPC* v. *Panhandle Eastern Pipe Line Co.*, 337 U.S. 498, 513-514 (1949). [Footnote omitted.]

The consistent course of FPC interpretation having, therefore, resolved any ambiguity there might be deemed to be in the Act, its meaning was clear. That clear meaning only Congress can amend.

Pages 34-36:

B. *Ex Parte* Communications by the General Counsel After Handling the Prosecution of the IP Proceeding Were Unlawful Apart from the APA

* * * * *

Even apart from the separation of functions provision of APA § 554(d) (*infra*, pp. 80-81), such *ex parte* communications as are here presented are clearly unlawful, and invalidate the decisions,[69] because they denied IP the fair hearing to which it was entitled under the Commission's Regulations (§ 3.161, Add. B, *infra*, p. 75) and order (*R. 124-127*). *Camero* v. *United States*, 375 F.2d 777, 779-781 (Ct. Cl. 1967); *cf. Hornsby* v. *Allen*, 326 F.2d 605, 608-609 (5th Cir. 1964). As the Court said in *Camero* (375 F.2d at 781):

> * * * Of course, one of the fundamental premises inhering in the concept of an adversary hearing, particularly if it is of the evidentiary type, is that neither adversary be permitted to engage in an *ex parte* communication concerning the merits of the case with those responsible for the decision. * * * It is difficult to imagine a more serious incursion on fairness than to permit the representative of one of the two parties to privately communicate his recommendation to the decision makers. To allow such activity would be to render the hearing virtually meaningless. We are of the opinion that due process forbids it. * * *

Where an administrative agency provides by order or regulation for a hearing, the affected party is entitled to a decision that satisfies that standard of fairness, irrespective of whether statute or Constitution requires

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[69] *Cf. Sangamon Valley Television Corp.* v. *United States*, 269 F.2d 22 (D.C. Cir. 1959); *Massachusetts Bay Telecasters* v. *FCC*, 261 F.2d 55, 66-67 (D.C. Cir. 1958); *WKAT* v. *FCC*, 258 F.2d 418 (D.C. Cir. 1958).

such hearing.[70] Any failure to measure up to that standard makes the agency's order unlawful. *Vitarelli* v. *Seaton*, 359 U.S. 535 (1959); *Service* v. *Dulles*, 354 U.S. 363 (1957); *Camero* v. *United States*, 375 F.2d 777, 779-781 (Ct. Cl. 1967); *cf. United States* v. *Libby, McNeil & Libby*, 107 F. Supp. 697, 703 (D. Alaska, 1952).

This is but an application of the standard of fairness that is at the heart of the constitutional concept of due process. That standard requires that the judge or decision-making body be free from any off-the-record involvement with either side to the controversy before it. In re *Murchison*, 349 U.S. 133, 136 (1955); *United States ex rel Accardi* v. *Shaughnessy*, 347 U.S. 260, 266-8 (1954); *American Cyanamid Co.* v. *FTC*, 363 F.2d 757, 767 (6th Cir. 1966); *Texaco, Inc.* v. *FTC*, 336 F.2d 754, 760 (D.C. Cir. 1964); *Amos Treat & Co., Inc.* v. *SEC*, 306 F.2d 260, 267 (D.C. Dir. 1962); *Columbia Research Corp.* v. *Schaffer*, 256 F.2d 677 (2nd Cir. 1958); *Trans World Airlines, Inc.* v. *CAB*, 254 F.2d 90 (D.C. Cir. 1958). As Mr. Justice Jackson said for the Court in *Wong Yang Sung* v. *McGrath*, 339 U.S. 33, 44 (1950): "* * * [T]he disqualifications produced by investigation or advocacy are personal psychological ones which result from engaging in those

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[70] Here the Act, too, required a hearing. The FPC proceeding and order was the initial step for issuance of a certificate. The only statutory authority cited for the proceeding was the certificate provisions of the Act, §§ 7(c) and (e) (R. 44, 296, ¶ 1). § 7(c) requires a hearing (*infra*, p. 66). APA 554(b)(2) (*infra*, p. 80) and FPC Regulation § 1.20(m)(2) (*infra*, p. 71) require such statement of the legal authority under which the proceeding is conducted. No other authority may now be asserted because it is well established that the FPC may not be sustained on grounds other than those it has assigned. *Sunray Mid-Continent Oil Co.* v. *FPC*, 353 U.S. 944 (1957); *SEC* v. *Chenery Corp.*, 318 U.S. 80, 87-95 (1943), *idem*, 332 U.S. 194, 196-201 (1947). Accordingly, the FPC must be deemed to have proceeded solely under §§ 7(c) and (e).

types of activity; and the problem is simply one of isolating those who engage in the activity * * *."

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Pages 52-53:

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1. These Memoranda "Would be Available by Law" Within the Meaning of FIA § 552(b)(5)

These memoranda would be available by law to the applicant in each of those four cases under *Morgan* v. *United States*, 304 U.S. 1, 18-19 (1938; "second *Morgan*"). There the Supreme Court, on review of a rate order of the Secretary of Agriculture, held:

> * * * The right to a hearing embraces not only the right to present evidence, but also a reasonable opportunity to know the claims of the opposing party and to meet them. The right to submit argument implies that opportunity; otherwise the right may be a barren one. Those who are brought into contest with the Government in a quasi-judicial proceeding aimed at the control of their activities *are entitled to be fairly advised of what the Government* proposes and to be heard upon its proposal before it issues its final command. [Emphasis supplied.]

The fact that the applicants in the FPC disclaimer cases did not seek to enforce their second *Morgan* right, or, having gotten agreeable decisions, felt no need to do so, is immaterial. Their right was not contingent upon an adverse decision, it was a right to know before decision. For it was the right to a reasonable opportunity to know the claims of the opposing party and to meet them. Such a right would not be satisfied if the party could not know the claims until the agency had made its decision, and then only if the decision were adverse.

Nor does the fact that FPC ultimately made an agreeable decision necessarily mean that the Staff's claims were not

adverse, or that the applicant's chances of a favorable decision might not have been enhanced by knowing and meeting the Staff's claims, including meeting any insufficiencies of an otherwise favorable Staff position.

Moreover, for present purposes, the significant thing is that the FIA made the existence of such right a key to the availability of the general rights it created. The existence, not the exercise, of the individual's right is the criterion.[90]

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Pages 61-63:

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D. Disclosure of 11 to 29 Year-Old Records Is Not Within the FIA § 552(b)(5) Exception From Freedom of Information

Finally, even if the memoranda here sought were to be held originally nonproducible, they are nevertheless now subject to disclosure because of the passage of time. The legislative history of the FIA admits of no doubt that the disclosure precluded by the FIA § 552(b)(5) exception was "premature" disclosure. Here, from 11 to 29 years have elapsed since the memoranda in question were submitted (Ct. R. 5:4-5).

The Senate Committee Report[107] says specifically of exception 5:

> * * * It was argued, and with merit, that efficiency of Government would be greatly hampered if, with respect to legal and policy matters, all government agencies were *prematurely* forced to "operate in a fish

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[90] *American Mail Line, Ltd.* v. *Gulick*, 411 F.2d 696, 704 (D.C. Cir. 1969); *General Services Adm'n.* v. *Benson*, 415 F.2d 878, 880 (1969); *Cf.* Davis: *The Information Act*, 34 U. of Chicago L. Rev. 761, 765, 794-797 (1966), and see references therein to the legislative history on this purpose of Congress; also *supra*, p. 42, n. 76.

[107] S. Rep. No. 813 to accompany S. 1160 (1965), 89th Cong., 1st Sess., p. 9.

> bowl." The committee is convinced of the merits of this general proposition, but it has attempted to delimit the exception as narrowly as consistent with efficient operation. [Emphasis supplied.]

The House Committee Report [108] omits the word "prematurely," but conveys the same thought with even more force by saying:

> Moreover, a Government agency cannot always operate effectively if it is required to disclose documents or information which it has received or generated *before it completes the process* of awarding a contract or issuing an order, decision or regulation. * * * [Emphasis supplied.]

President Johnson's short statement [109] upon approving the bill made the same point:

> * * * Officials within Government must be able to communicate with one another fully and frankly without publicity. They cannot operate effectively if required to disclose information *prematurely* * * *. [Emphasis supplied.]

And the Attorney General's Memorandum [110] says:

> * * * Congress did not intend to require production of such documents where *premature* disclosure would harm the authorized and appropriate purpose for which they are being used. [Emphasis supplied.]

* * * * *

We submit that the lapse of 11 to 29 years since the issuance of the disclaimer orders is *prima facie* proof that disclosure of the memoranda cannot now be "prema-

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[108] H.R. Rep. No. 1497 to accompany S. 1160 (1966), 89th Cong., 2d Sess., p. 10.

[109] P. II of the Attorney General's Memorandum, *supra*, p. 42, n. 76.

[110] *Id.* at p. 36.

ture." [111] It follows that these memoranda would by now certainly have become open to disclosure even if they had not been so originally.

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Pages 53-56:

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2. Disclosure of these Memoranda Does Not Conflict with the Purpose of the FIA § 552(b)(5) Exemption

The disclosure thus called for here does not conflict with the recognized need for government officials to be able to communicate with one another fully and frankly and without publicity, or their need to have the help of confidential assistant in the decision-making process. The oft-cited analogy to communications between a judge and his law clerks [91] is misleading where the documents involved are one side's "case" in a quasi-judicial proceeding of the kind involved here. For the Staff that prepared these memoranda is the same Staff, performing the same functions, on the same kind of problems as it performs in proceedings that go to hearing (where its output must all be public).

The Staff performs the same investigative function whether a hearing is held or not.[92] If a hearing is held, the

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[111] Compare *Rosee* v. *Board of Trade*, 36 F.R.D. 684, 690 (N.D. Ill. 1965), holding reports of trades and trading positions of parties who were not defendants in that case as to transactions 4-6 years before were not privileged, and *Cooney* v. *Sun Shipbuilding & Drydock Co.*, 288 F.Supp. 708, 711-712 (E.D. Pa. 1968), holding a 4½-year-old report of an investigation of an accident not exempt from disclosure under § 552(b)(7).

[91] See Ct. R. 10:10.

[92] 18 C.F.R. § 3.105 reads as follows: "*Investigative functions.* Investigations made pursuant to the general authority provided * * * in section 14(a) of the Natural Gas Act are conducted by the bureau or office primarily concerned with the subject matter, with the OGC [Office of the General Counsel] participating on the legal aspects thereof. After notice, hearings *may* be held." (Emphasis supplied.) And see note 94, *infra*.

Staff appears through its counsel from the Office of the General Counsel and his technical advisors and witnesses from the Bureau of Natural Gas. The Staff participates throughout such proceedings precisely as do its counterparts until decision by the Commission.[93] If no hearing is held the Staff does the same thing by submitting "studies and recommendations upon which, together with the applicant's filing, the Commission reaches its decision."[94]

Here the FPC recognizes and confirms that the memoranda in question were produced for such submission *to* the FPC, by its limited description of them as memoranda that are *"utilized by* the Commission in its decisional process" (Ct. R. 5:6, ¶ 6; 6:15; emphasis supplied). That they are "utilized by" the FPC does not mean that they are any more part of the decisional process itself, and must be kept secret, than the evidence and briefs the Staff submits publicly in a hearing. The memoranda are not a part of the "mental process" that may not be "probed" under the second *Morgan dictum*[94a] any more than the evidence and briefs in the cases that go to hearing. Rather, such memoranda are part of the process that *precedes* the decisional process, part of the submissional process, if we may coin the word. They are within the scope of the "claims of the opposing party" which the applicant is entitled to meet, they are "what the Government proposes" upon which the applicant is entitled to be heard, under the rule of second *Morgan*.

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[93] See, e.g., 18 C.F.R. §§ 1.18(e); 1.20(e), (g), (j); 1.25(a); 1.26(e); 1.29(a), (b); 1.30(e); 1.31(a), (d); 1.33. Both are restricted against *ex parte* communications. 18 C.F.R. §§ 1.4(d), 1.30(f), *infra*, pp. 70, 72.

[94] 18 C.F.R. §§ 3.100(b), 3.103, 3.161, Add. B, *infra*, pp. 74-75.

[94a] 304 U.S. at p. 18; see the similar *dictum* in fourth *Morgan* (*United States* v. *Morgan*, 313 U.S. 309, 422 (1941)).

Provision is properly[95] made in the FPC organization for confidential assistants.[96] Their memoranda are not involved here. If the advice of the General Counsel is needed by the FPC in the decision of cases, it can be received in public argument where he can be answered, as § 554(d) contemplates, or arrangements can be made to insulate him from participation in the prosecuting functions. For while Congress recognized that the prosecuting and adjudicatory functions are properly combined at the agency level by the express exception it wrote into the separation of functions provision of the APA (5 U.S.C. § 554(d)(E)), the exception does not extend below that level.[97] Thus the disclosure of these memoranda will in no way jeopardize the effectiveness of the Commission's discharge of its duties.

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[95] See *T.S.C. Motor Frt. Lines, Inc.* v. *United States*, 186 F. Supp. 777, 787, 790 (S.D. Tex. 1960), *affirmed per curiam sub nom. Herrin Transp. Co.* v. *United States*, 366 U.S. 419 (1961); see also *Kaiser Alum. & Chem. Corp.* v. *United States*, 157 F. Supp. 939, 943-944 (Ct. Cl. 1958).

[96] See 18 C.F.R. §§ 3.4(b), 3.4(e)(7).

[97] *Amos Treat & Co., Inc.* v. *SEC*, 306 F.2d 260, 266-7 (D.C. Cir. 1962); *Columbia Research Corp.* v. *Schaffer*, 256 F.2d 677, 679 (2nd Cir. 1958); *Low* v. *Thomas*, 163 F. Supp. 945 (E.D. Pa. 1958); *G. J. Howard Co.* v. *Cassidy*, 162 F. Supp. 568, 574 (E.D.N.Y. 1958); *Pinkus* v. *Reilly*, 157 F. Supp. 548 (D.N.J. 1957); *Cf. Pangburn* v. *CAB*, 311 F.2d 349, 356 (1st Cir. 1962).